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FRANK W. GRINNELL.

Sworn to and subscribed before me this 13th day of March, 1925.

Rudolph P. Berle,
Notary Public.

(*My commission expires November 5, 1931.*)

[seal]

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INTRODUCTORY NOTE TO CHIEF JUSTICE BOND'S ADDRESS

In reprinting this address, as the editor happened to have pictures of some of the judges who are mentioned, it seemed likely to add to the interest if these portraits were reproduced, so that we might see some of the characters who stood out on the bench, for better or for worse, as "judicial ethics" developed, with the common law, through the hard living, hard drinking, hard swearing, but, nevertheless, and above all, hard thinking, legal generations of the Stuarts and the earlier Hanoverian kings.

There is something for the bench and bar to think about to-day in this story of the struggle and gradual influence of individual character on the bench, and Judge Bond's emphasis on the influence of the character of Lord Chief Justice Holt. The act of settlement of 1701, by which English judges were commissioned to hold their offices "during good behavior", instead of during the pleasure of the king, came soon after Holt had demonstrated what a judge could and should be, and that act, later extended to cover a change in kings, has steadied the English government ever since, and furnished the standard for Massachusetts and for our Federal government. That act put an end to the servility of the English bench which characterized the Stuart regime and was illustrated by Justice Heath's remark to Archbishop Sancroft, in the reign of James II, "you need not trouble yourself with what I said on the bench. I have instructions for what I said and I had lost my place if I had not said it," (Mass. L. Q., May, 1917, 372).

The pictures here reproduced have been picked up during the past fifteen years or so in old book stores and print shops. Some are commonly known, others, like those here given of Chief Justice Gascoigne, Heneage Finch (Lord Nottingham), Lord Hardwicke, and Lord Macclesfield, are less common.

It is, perhaps, unnecessary to remind the bar of Pope's famous description of Lord Bacon as "the wisest, brightest, meanest of mankind;" that Lord Nottingham has been called the "father of Equity;" and that Lord Hardwicke, while sometimes called, if I remember correctly, "the old spider of Westminster Hall," was, in spite of his political activities, one of the greatest of equity judges.

F. W. G.

Chief Justice of the King's Bench, 1689-1710

THE GROWTH OF JUDICIAL ETHICS

Address by JUDGE CARROLL T. BOND

(Before the Maryland State Bar Association in June, 1924.)

There is some reason for doubting whether a paper of this kind is in place at a Bar Association Meeting, for it does not touch upon anything of immediate importance; it can hardly be rated as anything more than a professional diversion. Our president here thought that the material could be made into a readable paper, however, and here it is—such as it is—entirely on his responsibility. It is a collection of facts made some time back, and suggested in the first instance by a remark made of Sir John Holt, the Lord Chief Justice of England who took office after the Revolution, in 1689, and presided until his death in 1710. Holt was one of those men of originality and initiative who by a sort of reflex seem to have been born to meet particular needs; and, if ever a judge might be called dynamic, he was one of the very foremost of the kind. To him are traced, perhaps, the beginnings of more of our commonplaces of the law than are traced to any other judge in our legal history, and he is commonly credited with having inaugurated the modern judicial attitude, or as the phrase now is, judicial ethics. Lord Campbell said of him, that he was, "the model on which, in England, the judicial character has been formed." And Foss, the encyclopædic historian of the judges of old, says, "In him may be fixed the commencement of a new era of judicial purity and freedom, marked with that perfect exemption from extraneous influences which has, with few exceptions, ever since distinguished the bench, and which is now the undisputed glory of our judicature."

Just what was the change which Holt inaugurated? The full answer could be found only in a long story, a story of slow development rather than of the changes of a few years; and that, much abridged, is what will be attempted in this paper. Probably most of us were bred as lawyers on the notion that the moralities in the work of judges were sprung from the earth of old, adult and full-armed as we now know them, and that one of the greatest of the inheritances of English-speaking lawyers has been the fact of unwavering adher-

ence by the judges to these same obvious moralities through all times, however crude—barring, of course, Lord Bacon and Judge Jeffreys, who have provided the villains of our piece. We cherish stories such as that of William Marshall, Earl of Pembroke, in the time of the Great Charter, and one of the King's justiciars, who answered some importunity of his royal master: "Nor would it be for the King's honor that I should submit to his will against reason, whereby I should rather do wrong to him and that justice, which he is bound to administer towards his people; and I should give an ill example to all men in deserting justice and right in compliance with his mistaken will. For this would show that I loved my worldly wealth better than justice." And, Hengham, Chief Justice under Edward I. rather dramatically checked a proceeding before the King and Parliament because of unfairness in the writ. Isabel, Countess of Albermarle, was brought forward for trial on vaguely defined charges, and she objected to the writ for that reason. Two judges were about to overrule her objection, when Hengham took up the point, berated each of those two in turn with an instance of injustice done by him by such proceedings, and ended by declaring: "The law wills that no one be taken by surprise in the King's Court. But if you had your way this lady would answer in court for what she has not been warned to answer by writ. Therefore she shall be warned by writ of the articles of which she is to answer, and this is the law of the land." Then, the story runs, arose the King, who was very wise, and said, "I have nothing to do with your disputations, but God's Blood! You shall give me a good writ before you arise hence."

And there is the splendid example of Lord Chief Justice Gascoigne, who refused the demand of Henry IV that he pronounce sentence of death without trial upon two captured nobles, Scrope, Archbishop of York, and Mowbray, who had taken up arms against the King. "Neither you, my lord," said the judge, "nor any of your subjects, can, according to the law of the realm, sentence any prelate to death; and the Earl has a right to be tried by his peers." And thus the King was driven to another judge to accomplish his purpose.

This Gascoigne was also the chief justice who committed the prince, (Shakespeare's Prince Hal) to prison for contempt of court. And he was the one referred to by Falstaff when, on hearing of the accession of the prince to the throne, he shouted, "Blessed are they that have been my friends, and woe unto my lord chief justice."

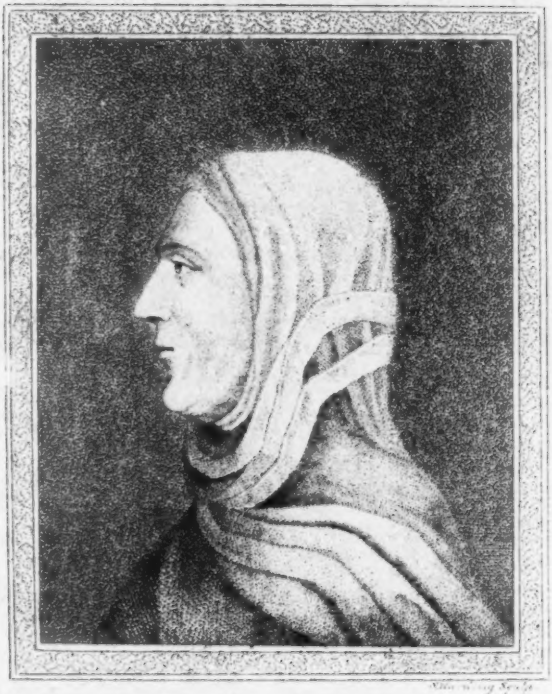
Instances of noble conduct such as these are not a few; and good maxims and ideals were widely current then. Maxims and ideals seem, indeed, to be much the same in all periods. It is, of course, only in the habitudes and conventions which are slowly built up that the foundations for enduring high ethics are to be found; and these had not yet been developed. Men were not yet tamed to their maxims and ideals.

It may be interesting to compare conditions in a distant century, and so to get a glimpse of the growth which had to be made from that time on. Take the 13th Century, a period which saw such a flowering of mediæval culture and held such powerful leaders on its stage that it has come to be called "The Great Thirteenth Century." With all its glory it was a time of half-savage life. The judicial function was not yet so highly specialized as we know it, and men shifted easily from one work to another. The able-bodied judges fought in the wars, upon occasion, as became men of their time. Hugh de Cressingham,—a fine old, mediæval name—Hugh de Cressingham, who for four years was at the head of the justices itinerant, and at the same time rector of Chalk in Kent, was appointed Treasurer of Scotland in 1296, and on the rising of Wallace in the following year, threw aside his legal rules and cassock, and fell in battle on the banks of the Forth. And such had been his administration of his office in Scotland that when the victorious Scots got his body, they stripped off any unbroken areas of skin for trophies and then cut the body up into uttermost mincedmeat. And we read of other judges fighting in the wars, or in private mortal combats. Impersonal justice according to law seems to have been a conception which had slight hold in the higher courts. Interference by princes, nobles, patrons and friends in private suits was usual, and there was general corruption and bribe-taking by the

judges. Their salaries were small and unassured, and there was a strong temptation to forage for support; and there is doubtless some extenuation to be found in that. In 1289, when the king returned from three years in France, he was met with great complaints of bribery of judges, of extortion by them, of giving false judgments, and even of heavier crimes; and after investigation he dismissed in disgrace all the judges of the King's Bench except one, four out of five in the Common Pleas, four Justices Itinerant, one officer of the Exchequer, and a Master of the Rolls, besides many smaller officials. The Chief Justice of the Common Pleas was charged with having instigated a murder by his servants, and with having then protected them from punishment. Hengham, Chief Justice of the King's Bench, the same judge who, as we have heard, protested against the vague writ in the case of Isabel, Countess of Albermarle, was one of those dismissed. Traditions of his offense and punishment differ somewhat. There was one, that he was found guilty, among other crimes, of having altered a record to reduce the fine of a poor woman, and that for this the fine imposed upon him was so large that it paid for the building of a "clock-house" at Westminster. This furnished a half-humorous saying of the profession for four hundred years, or more. Justice Southcote, one of Elizabeth's Judges, when he refused to make an erasure in a record for some beneficent purpose, said, "he meant not to build a clock-house." And Siderfin, in 1668, reported a refusal of the judges to alter a record, lest they should incur the "danger of erecting a clock-house."

Some of the other judges dismissed by Edward were found guilty of false judgments, imprisoning for profit and without legal cause, illegal seizure of property, and the like. Still another judge was found guilty only of taking a verdict from eleven jurors although the twelfth disagreed with them.

The story from that time is one of growth, but growth which was sometimes imperceptible in short periods; sometimes there seems to have been unquestionable loss of ground. The minor courts, so far as the records disclose, may be thought to have functioned fairly well, but the records of the



Sr. WILLIAM GASCOIGNE,

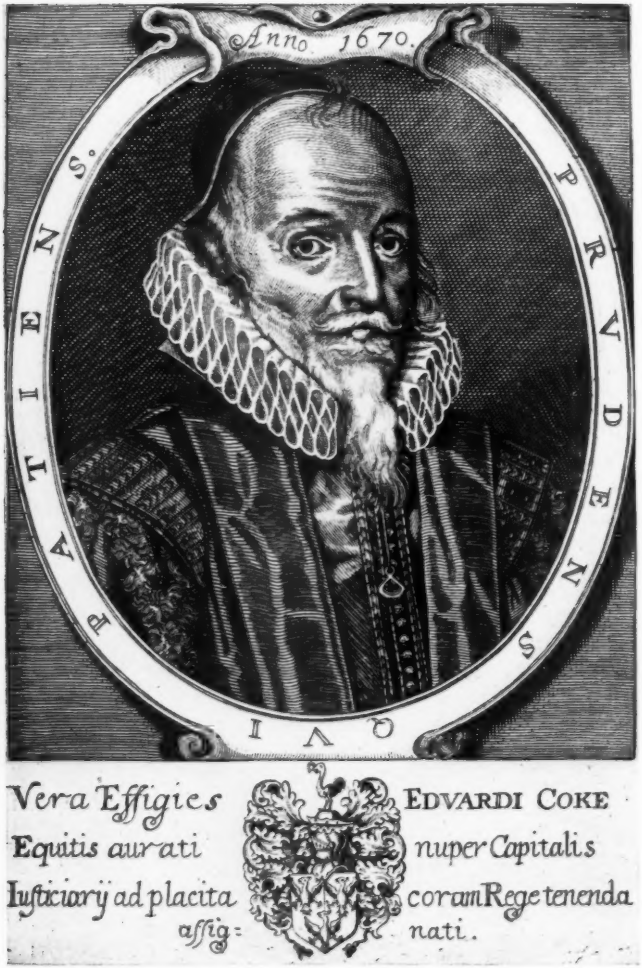
CHIEF JUSTICE OF THE KINGS BENCH.

Henry IV. Died 13.

From an original Drawing taken from his Monument at Harwood in Yorkshire. by Wm. Hury Esqr.

London Publ. Sept. 1. 1786. by E. Harding, No. 127. Fleet Street.

Chief Justice, 1400-1413



Chief Justice of the Common Pleas, 1606–1613
Chief Justice of the King's Bench, 1613–1616

higher courts show continued interference and terrorizing by strong men, and on the other side yielding by the judges to the interests of the king or the great feudatories. The interference was not always *vi et armis*, it was often by gentler means; and Alice Perrers, the mistress of Edward III, made herself so notorious and odious by her intervention in behalf of her friends that she brought on the enactment of a statute forbidding women in general, and Alice in particular, to appear in court in support of causes. Corruption of judges continued to be common. Another Chief Justice was removed in the 14th Century. A wholesome popular outcry arose now and then, and augured better things, but the road to the turning was long, and men of the law not without some reason, were long to continue low in the general estimation. In the Peasants' Rising of 1381, the rebellion which for centuries has been derided under the name of "Wat Tyler's Rebellion," but which is now regarded as an outbreak of importance, and called "The Great Revolt of 1381," not unnaturally, much of the bitterness of the movement was directed against the law and lawyers. The Chief Justice, Sir John Cavendish, was a marked man. He fled, closely pursued, and was about to reach a small boat lying at the edge of the River Brandon, and so make his escape, when a certain Katherine Gamen, standing there and realizing what was going on, pushed the boat off into mid-stream, so that the Chief Justice was caught and killed. In the reaction which followed upon the suppression of the rebellion, Tresilian, the Chief Justice who succeeded Cavendish, wreaked brutal vengeance from the bench, much as Jeffreys did after the suppression of the Monmouth Rebellion three hundred years later, although on a smaller scale. He has been described as the Jeffreys of this earlier rebellion, and the Assize of St. Albans presided over by him, is fairly comparable to the "Bloody Assize."

One common incident of justice in these early days was the predetermination of the result, before trial, and even the use of the form of trial to work the personal will of monarchs and others who had the power to do it. In the Paston Letters, of the 15th Century, we read these instructions of Sir John Fastolf to one of his agents regarding some pending litigation.

" Labor of the Sheriff," he wrote, " for the return of such panels as will speak for me, and not be ashamed, for great labor will be made by Wentworth's party. Entreat the Sheriff as well as ye can by reasonable rewards, rather than fail." And we read in the very next letter of that collection a report to John Paston by agents of his attending a prosecution of Lord Moleyns for a raid on Paston's house. " Also," they say, " the Sheriff informed us that he hath writing from the King that he shall make such a panel to acquit the Lord Moleyns. And also he told us, and as far as we can conceive and feel, the Sheriff will panel gentlemen to acquit the Lord, and jurors to acquit his men; and we suppose that is by motion and means of the other party." A postscript to that letter reads, in part: "And also, Sir, as we conceive, the Lord Moleyns shall not be acquitted before Thursday; in as much as he was indicted before the Justice, we understand he shall not be acquitted but before the Justice." As will be noticed there were sticklers for regularity in procedure at that time, too.

And in a note book of Thomas Cromwell, Minister of Henry VIII, in the following century, there are these entries:

" Item—The Abott of Reading to be sent down to be tried and executed at Reading with his accomplices.

Item—The Abbott of Glaston to be tried at Glaston and also to be executed there."

And we shall see further instances of this attitude toward the courts and their work.

In the Sixteenth Century, the century of the strong Tudor monarchs, political assassinations through judicial proceedings become conspicuous. Howell's State Trials makes several of these proceedings part of our familiar lore. In them, determination to do away with the accused was commonly and obviously the whole purpose of trial, and the judges worked as prosecutors, often very angry ones. Before Sir Nicholas Throckmorton's trial began this conversation between his judges was overheard: " I like not this jury for our purpose," one judge is reported to have said, " They seem to be too pitiful and charitable to condemn the prisoner." "No,

no," said Sir Roger Cholmley, another of the judges, "I warrant you they be picked fellows for the nonce; he shall drink of the same cup his fellows have done." And this Sir Roger Cholmley, during the trial, openly coached the Attorney-General, until Throckmorton took him to task for it. The jurors failed to convict despite the careful picking of them. After the court had summed up by reading all the evidence that bore against the prisoner, and omitting all the prisoner's answers and explanations, they brought in a verdict of not guilty. Then the Chief Justice broke out with, "Remember yourselves better; have you considered substantially the whole evidence laid against the prisoner? The matter doth touch the Queen's highness and yourselves also; take good heed what you do." To this the jurors replied that they had found the prisoner not guilty agreeably to their consciences; and they were thereupon committed to the Tower. The result of that treatment was that Throckmorton's brother was shortly after convicted and executed on the same evidence. If your sense of the fitness of things requires that this Sir Roger Cholmley should have passed an old age of tormenting remorse, then the truth will disappoint you. The chroniclers report that: "The evening of his life he passed in the calm delights of literary retirement," and that out of his piety and forethought he founded a school.

In these Sixteenth Century political trials the prisoners were baited from the bench outrageously. And the judges were not the only participants in the sport. The classic of baiting is that of Coke, Attorney General in the trial of Raleigh, a little later, in the reign of James. Recall the well-known colloquy, and this in the trial by jury of a man for his life:

COKE: "Thou are the most vile and execrable traitor that ever lived."

RALEIGH: "You speak indiscreetly, barbarously, and uncivilly."

COKE: "I want words to sufficiently express thy viperous treasons."

RALEIGH: "I think you want words, indeed, for you have spoken one thing half a dozen times." And so on.

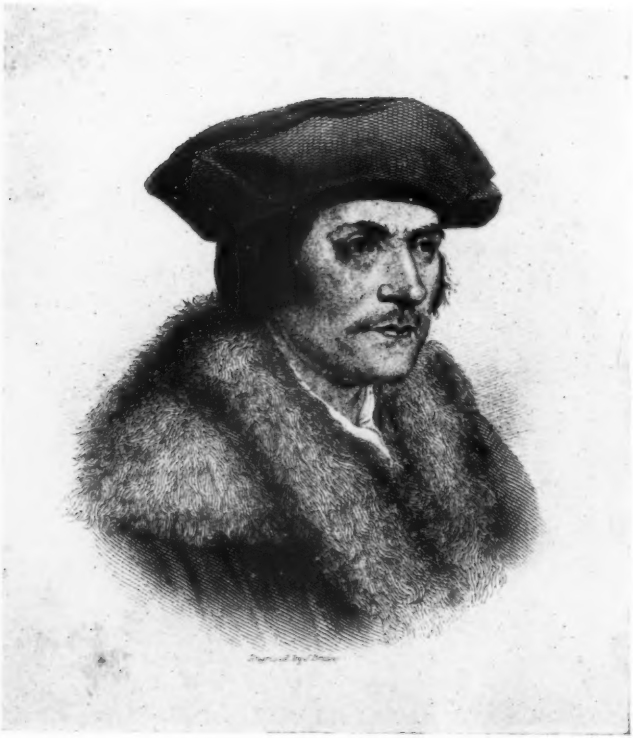
Coke was too small a man to cope with Raleigh in that sort of contest. It exhibits the temper in which trials were frequently conducted; and it exhibits Coke for what he was, even after he ascended the bench.

The acceptance of money from interested people, bribes, indeed, was not yet out of fashion during the reigns of the Tudors. The judges and all other classes of officials in the great Elizabethan age were notoriously, and rather unblushingly, corrupt. That is a well-known fact, but we hardly realize the extent to which corruption was prevalent until we review the facts in some of the special histories of the time. Francis I. of France expressed the prevalent opinion, when answering an appeal made to refrain from bribery, that the only means to attain an object was by force or corruption. Wolsey could receive pensions and gifts and himself confer bribes without finding it amiss. The system was well-nigh universal. When the arrangements for Philip's marriage with Mary were being made, one of the most important points discussed was the bribery of members of the English Royal Council; and Egmont wrote his master that more could be done with money in England than anywhere else in the world. Every powerful nobleman had retainers in the suites of other powerful men; and every monarch had spies in the closest royal circles in other countires. Even one so high as Leicester took commissions on all public business which passed through his hands. Officers of the Queen's Council were bribed to connive at jobbery in the customs. The judiciary was often a servile bureaucracy where any high standard of integrity was rather the exception. So it was from top to bottom of official life. The poet George Wither says, in one of his poems,

"Now poor men to the justices,
With capon make their arrants."

Judges who received gifts from suitors were often none the less resolved to render exact justice; the inconsistency was as yet nowhere near so clearly apparent to men's minds as it has since become. Lord Bacon, while he confessed that

FRANCIS BACON
Lord Chancellor, 1617-1621



SIR THOMAS MORE

Lord Chancellor, 1529-1532

his acts amounted to corruption, and were worthy of condemnation, explicitly denied that he had ever been guilty of any sale of justice, affirming that he had never "had a bribe or reward in his eye or thought when he pronounced any sentence or order." And the old note taker, John Aubrey, gives us an illuminating incident in connection with Bacon's fall. "The Earl of Manchester," he says, "being removed from his place of Lord Chief Justice of the Common Pleas to be Lord President of the Council told my Lord (upon his fall) that he was sorry to see him made such an example." Bacon was caught in the ebb of the practice. And the odium attached to his name now is very largely a growth of a later and more advanced age; there seems to have been not enough of it in his lifetime to trouble him greatly.

In the archives of the Borough of Lyme Regis, under the year 1620, when the borough charter was in litigation, there is an entry that a meeting left it "to the Mayor's discretion what gratuity he will give to the lord chief justice and his men."

There is another side to this picture of the times. Some judges and public men were conspicuous for their refusal of gifts. Roper, the son-in-law and biographer of Sir Thomas More, makes special mention of More's refusal of New Year's gifts from suitors, and shows that no little tact and delicacy were needed to make the refusal without giving offense. For instance, as Roper says, "one Master Graham's gift of a fair gilt cup, the fashion whereof he (More) very well liking," was not refused at all, but was merely offset or neutralized by another, or return gift, More having "caused one of his own, though not in his fantasy so good a fashion, yet better in value, to be brought out of his chamber, which he willed the messenger, in recompense, to deliver unto his master, and under other conditions would he in no wise receive it." Sir Christopher Hatton, and Sir Henry Sidney were incorruptible officials, as were Lord Bacon's father, Sir Nicholas Bacon, and his uncle, William Cecil, the "Great Lord Burghley." Queen Mary was praised for not selling to the highest bidder the great offices of State, and in this she presented a contrast

to the conduct of Elizabeth, who did sell them off. The practice of New Year's gifts from suitors to judges, and the sale of offices by judges, was destined to have a vigorous life for another hundred years and more.

The inclination of men to open their way by gifts to those who may favor them seems to be a general and deeply ingrained one. For one thing, the making of gifts is a natural, almost inevitable consequence of the wilful exercise of official power, whether in judicature or otherwise, for men will naturally tend to propitiate or influence anyone who wields personal power over them. Just in so far as the limits of impersonal justice are overstepped, some sort of personal appeal is made relevant and natural. But gifts are not always the outcome of sordid motives. There is a disposition, and an innocent one, to please men in prominent positions by gifts. The motives may be so mixed, too, that the unwisdom of any gift is not obvious. It was by no means inevitable that Englishmen should have turned upon the practice and eventually ended it. In a recent article describing the new commercial courts in England, Lord Justice Scrutton has remarked that in some South American countries today, gifts to judges are common and involve no disgrace. But our ancestors in the law turned upon such personal influencing. Suitors more and more insistently complained; and perhaps some of the difference between our fathers in the law and people of the other countries may be stated in terms of kicking capacity. There is significance in the early currency of one of our professional anecdotes: that of a litigant, who was warned by his counsel that a gift to the judge with the client's name attached, might cause the loss of the case, and who thereupon sent the gift in the name of his opponent. That story is found in the " Table Talk " of John Selden, a contemporary of Lord Bacon, although twenty years younger. During the Seventeenth Century we find the preachers in their sermons attacking the judges. Even in some of the sermons with which court sessions were regularly opened, the clergymen made bold to say their say on the subject. At Thetford Assizes, in March, 1630, a Mr. Ramsey, the preacher " touched pithily," we are told, " on the corruption of

"THE BLOODY JEFFREYS"

Chief Justice of the King's Bench, 1683-1685
Lord Chancellor, 1685

judges favoring of causes, and of counselors taking fees to be silent." And at the Bury Assizes, in the summer of 1631, " one Mr. Scott made a sore sermon in discovery of corruption in judges and others." At Norwich, we read, " Mr. Greene was more plain, insomuch that Judge Harvey, in his charge to the jury broke out thus: ' It seems by the sermon that we are corrupt, but know that we can use conscience in our places, as well as the best clergyman of all'."

The Seventeenth Century was the century of Jeffreys, of the Popish Plot of 1678, of the Rye House Plot of 1683, and of the Monmouth Rebellion. But without much break in the continuity of them we find judicial assassinations, and prosecuting judges much earlier, in the first half. Sir Harry Vane's execution was a bald use of judicial procedure as a mere cloak for assassination. In William Penn's trial, on a charge of tumultuous assembling, the Recorder, in his efforts to convict called to the jury, " We shall have a verdict by the help of God, or you shall starve for it." And after an acquittal the jury were fined and imprisoned. It is quite clear now that there never was any Popish Plot, yet Titus Oates' machinations and transparent perjuries produced a panic terror, and resulted in the judicial murder of fourteen Roman Catholics. So with the Rye House Plot; it probably never existed. The reign of James II was an era of almost unmitigated judicial tyranny. The judges slavishly carried out the King's despotic designs, Jeffreys leading them in his zeal. It is hardly possible even for modern eyes to read the notes of the trials after the Monmouth Rebellion without tears for some of the pitiful victims of this judicature. Modern lawyers simply cannot conceive of such proceedings as trials. It may help a little to recall that this was a century of civil war and revolution, that partisan spirit, and, indeed, partisan fear, were most intense, and that the prosecutions were warfare. And our idea of impersonal justice was still by no means so clearly established in men's minds. Coke nobly retorted to James I with the theory of independence of the judiciary, but Bacon's theory of lions under the throne was more in harmony with the facts as yet. Judges held office during most of the century simply at the King's pleasure, and with few excep-

tions up to the Revolution of 1688 they were completely subservient, and individuals whose legal rights might interfere simply lost their rights. James I and Charles I interfered with the courts as their interests dictated, calling judges to account and reprimanding them for any obstruction. Bacon advised James " to make some example against the presumption of a judge, whereby the whole body of those magistrates may be contained in better awe." And the degradation of the bench was one of the causes of the rebellion against Charles I. Jeffreys, although the worst of the judges of the century, was by no means alone in his outrageous conduct. There were a half dozen or more whose records differ from that of Jeffreys only in degree of partisanship and malevolence. Even Jeffreys has had a good word said for him. We have contemporary testimony that, " When in temper and where his own interest was not concerned, my Lord Jeffreys became the Bench with uncommon dignity." It seems not unlikely that these judges, or many of them, conceived of themselves as admirable judges. Their courts were opened with dignified processions, and with sermons devoutly listened to. Frantic justice is, indeed, a possibility in all times of great popular emotion, in defiance of the best forms and conventions. Sir Gilbert Murray cites as a mark of stability and balance in the Athenians during the Peloponnesian War that, " There were very few executions of citizens and no judicial murders even when passions ran most fiercely. And *pari passu*," he adds, " there were no assassinations." Perhaps in such times judges may be more likely to yield to intense partisanship than those whose emotions are disciplined by the daily stresses of competition in the street and in the market places. In another place, Sir Gilbert Murray says, " The clergy, that is to say, the prophets and oracle-dealers, are represented in Greek comedy, just as they are later by Erasmus and Voltaire, as more ferocious in their war passions than the average layman."

But throughout that century in England, which has furnished us our most horrible examples, high principles of judicature were nourished in some breasts. When Charles I tried to stop a suit against some of the members of the High Commission Court for false imprisonment, the judges, Hyde,

Judge of the Common Pleas, 1654-1660
Chief Baron of the Exchequer, 1660-1671
Chief Justice of the King's Bench, 1671-1676

Lord Keeper, 1673–1675

Lord Chancellor, 1675–1682

Jones, Whitelocke and Croke answered him that they could not stop it without breach of their oaths, and that it was against law to exempt any man from answering the action of another that would sue him. Heneage Finch, Atkyns, Hale were all good men. Sir Matthew Hale, Lord Chief Justice under Charles II, was one of the saints of the law. Like many saints, he was an ascetic in some respects, and moved apart from the ordinary currents of his time. To avoid ostentation he wore extremely shabby clothes; and in avoiding gifts he not only refused the customary perquisites like the venison for the justices on circuit, but insisted on paying more than the regular prices for his domestic supplies. He was scrupulously fair and gentle, and though living in a most passionate era, lived without enemies. In the perspective of centuries he is now seen as one of the two or three greatest lawyers of English history. He had a wide range of learning, and brought to the law a broader understanding than most men could hope for, and Holdsworth definitely places him above Lord Coke for learning and true comprehension of the law. Coke is receding.

Hale formulated for himself a code of judicial conduct which must be one of the earliest if not the first. He headed it: "Things necessary to be continually had in remembrance." And it proceeds by articles.

"I. That in the administration of justice, I am entrusted for God, the king, and country; and therefore,

II. That it be done, 1st, uprightly; 2ndly, deliberately; 3dly, resolutely.

III. That I rest not upon my own understanding or strength, but implore and rest upon the direction and strength of God.

IV. That in the execution of justice I carefully lay aside my own passions, and not give way to them, however provoked.

V. That I be wholly intent upon the business I am about, remitting all other cares and thoughts as unseasonable and interruptions.

VI. That I suffer not myself to be prepossessed with any judgment at all, till the whole business, and both parties be heard.

VII. That I never engage myself in the beginning of any cause, but reserve myself unprejudiced till the whole be heard.

VIII. That in business capital, though my nature prompt me to pity, yet to consider that there is also a pity due to the country.

IX. That I be not too rigid in matters conscientious, when all the harm is diversity of judgment.

X. That I be not biased with compassion to the poor, or favor to the rich, in point of justice.

XI. That popular or court applause, or distaste, have no influence into anything I do in point of distribution of justice.

XII. Not to be solicitous what men will say or think, so long as I keep myself exactly according to the rules of justice.

XIII. If in criminals it be a measuring cast, to incline to mercy and acquittal.

XIV. In criminals that consist merely in words when no harm ensues, moderation is no injustice.

XV. In criminals of blood, if the fact be evident, severity is justice.

XVI. To abhor all private solicitations, of what kind soever and by whomsoever, in matters depending.

XVII. To charge my servants: 1st, not to interpose in any business whatsoever; 2nd, not to take any more than their own fees; 3d, not to give any undue precedence to causes; 4th, not to recommend counsel.

XVIII. To be short and sparing at meals, that I may be fitted for business."

It is a statement of principles which will stand reading and re-reading, the simple statement of a gentle, pious man;

and it has not been excelled by modern efforts. But there is a sad contrast between the judicial rectitude of Hale, and the ordinary sway of passion and anger on the bench, and the consequent judicial horrors, in the decade immediately after him. Think of, and compare the angry harangues from the bench, the threats to juries and sometimes punishments for acquittals; think of the anxious, but hopeless efforts of the defendants, men, and women, too, to defend themselves against the odds of the bench fighting them. This storm of frantic justice was certain to bring a revolution. Fortunately, in Sir John Holt, England had just the man for the task of correction. And his work was permanent. The changes he inaugurated when he became Chief Justice were not expressions of temporary reaction, they were the offspring of the man's own uncompromising, changeless nature. The difference is, perhaps, best shown by comparison of some of the incidents of two trials; one, that of Alderman Cornish, presided over by Sir Thomas Jones, Chief Justice of the Common Pleas, in 1685, and the other, that of Lord Preston a few years later, presided over by Holt. Only a few incidents can be selected from each trial.

Alderman Cornish was tried upon a charge of having attended a treasonable meeting. He was accused by a man who bought his own freedom by the accusation, and he was probably not guilty at all, but there was a manifest purpose to give him little or no quarter. In reply to a sharp retort by the Attorney-General he said, " I am as innocent as any person in this court," and to that the Attorney-General replied, with a taunt, all before a jury, " So was my Lord Russell to his death, Mr. Cornish; do you remember that." To a protest from Cornish against a self-contradicting witness, the Chief Justice said, " Pray, sir, be not transported with passion; I doubt, before this time, notwithstanding the confidence you seem to have, there are few believe you to be as innocent as any person present." And when he commented upon the improbability of a piece of testimony the Chief Justice rejoined, " Is it enough to say improbability, improbability, improbability — is that enough? Have you said any more," Later Cornish announced, " I will call several persons to at-

test my constancy at my parish church, and receiving the Sacrament according to the rites of the Church of England; that I am, to all appearance, a person that does as well affect the government as any." And that brought from the bench the sneering remark, "I doubt you are all appearance." Testimony of Cornish's character was countered from the bench by remarks that the King's counsel could meet it with witnesses if it had been their business to do so (as, of course, it was) and testimony on other facts was attacked by suggestions of the judges that in important respects it confirmed testimony for the prosecution. It all made the prisoner cry out, "Pray, my lords, do not be offended; my life will do you no good." He was convicted and executed four days later.

Five years after that Lord Preston and two men named Ashton and Elliott came before Holt and two other judges for trial on a charge of conspiracy to restore James II to the throne by the aid of a French force. They had been caught concealed in the hold of a vessel bound for France, and papers found on Ashton disclosed the treasonable scheme. It should be remarked at the outset that Somers, as Attorney-General, prosecuted in a new and exemplary manner. Lord Preston went to trial first, and began fighting on the procedure, so pertinaciously that after a while he expressed a fear of having offended the judges. But Holt answered, "My lord, nobody blames you, though your lordship do urge things that are unnecessary and improper; and we shall take care that it shall not tend to your lordship's prejudice. We consider the condition you are in; you stand at the bar for your life; you shall have all the fair and just dealings that can be; and the court as in duty bound, will see that you have no wrong done you." Lord Preston questioned the identity of papers offered with those found in the boat, and one of the Crown counsel, misunderstanding him, interrupted to say he should not sum up yet; and here again Holt lent the prisoner a hand by explaining, "Brother, my lord opposes the reading of the papers as not well proved." After the conclusion of all the evidence Holt began to sum it up before the jury, and during this process the prisoner repeatedly interrupted; and to one of his apologies for doing so Holt replied, "Interrupt me as much

THOMAS PARKER, EARL OF MACCLESFIELD

Chief Justice of the Queen's Bench, 1710-1718

Lord Chancellor, 1718-1725

as you please, if I do not observe aright; I assure you I will do you no wrong willingly." "No, my lord," said the prisoner, "I see it well enough that your lordship would not."

Ashton next came up for trial, and just one incident of that trial may be ventured to show Holt's leaven at work. After Ashton had concluded his case, Holt reminded him of testimony given against him of his importunities to have the damaging papers thrown overboard, and said, "It seems material, and I would not have it forgot if you can answer it." To this Ashton replied, "I humbly thank your lordship, and whatsoever my fate is, I cannot but own I have had a fair trial for my life, and I thank your lordship for putting me in mind."

Both prisoners were convicted and sentenced to death.

After that time, there was never any general backsliding in judicial ethics, although, of course, particular judges have since conducted their courts in a manner far from that which the times have approved. Generally speaking, the ethical questions and distinctions which have arisen have been finer ones. Throughout the 1600's it was the custom for judges to receive New Year's gifts from interested persons, and at the end of the century Lords Cowper and Harcourt stopped that. It had also been the custom to sell to the highest bidder the offices under the appointment of the judges; and that came to an end with the fall of the Earl of Macclesfield, Lord Chief Justice and Lord Chancellor, in 1725. He had raised the prices so high that it seemed impossible for the purchasers to do other than tax suitors for it in devious was, and so repair their losses — as did one of the Masters in Chancery.

It took another century to bring up and settle a question of the propriety of political activities by judges. Both Hardwicke and Mansfield were active cabinet members while they were on the bench, and Lord Kenyon took a very active part in the squabbles of the House of Commons. In the Life of Hardwicke, written by one of his descendants, Philip C. Yorke, the author says, "The artificial but convenient and indeed necessary separation of judicial office from political activity, maintained in modern times, was not then invented, and

it would have been impossible to maintain a retirement and seclusion from politics, such as dictated by later etiquette, in our happier and more settled times. Modern scruples of this kind certainly never troubled Lord Hardwicke or any of his contemporaries.'' Mansfield closed eight years' active connection with the cabinet in 1765. Ten years later an outcry arose against it, and Junius then strongly arraigned Mansfield as a political judge; and Castlereigh said Mansfield was deeply impressed with a sense of his own indiscretion, and lamented it to the end of his life. Morals and ethics sometimes operate retrospectively, and condemn *ex post facto;* and Lord Mansfield was unfortunate in being caught in the ebb tide of an old, unquestioned practice. In 1806, the offer of a seat in the cabinet to Lord Ellenborough, without portfolio and without pay, brought the end of it. A resolution in Parliament condemning it failed of passage, but the public so clearly registered its opinion for the cessation of the practice that it was not revived. By a curious contradiction the Lord Chancellor has never been considered subject to the same rule.

Francis Page, a Baron of the Exchequer in England, and from 1727 to 1741 Lord Chief Justice, left a reputation for cruelty and coarseness that made men compare him with Jeffreys. He has an ugly immortality in the literature of the time. Pope, Dr. Johnson and Fielding each gave him a touch of the lash.

Toward the end of that century, when Englishmen were deeply alarmed by the progress of the French Revolution across the Channel, and by radical political movements at home, there was another reversion to frantic justice. The courts were filled with Government prosecutions of editors, non-conformist preachers and radicals who had argued for Parliamentary Reforms or pure representative government. These men had used some of the phrascology of the French revolutionists, and to some extent given their activities a false color by it, and for such crimes as they were thought to have committed, they were imprisoned or transported in numbers. And in Scotland Lord Braxfield, the original of Stevenson's Weir of Hermiston, gained the title of the Scottish Judge

PHILIP YORKE, EARL OF HARDWICKE

Chief Justice of the King's Bench, 1733-1737

Lord Chancellor, 1737-1756

WILLIAM MURRAY, EARL OF MANSFIELD

Chief Justice of the King's Bench, 1756-1788

Jeffreys by his conduct of trials in that country. Finally, the Government tried to have condemned to death the most influential of the reformers, Thomas Hardy, founder of an organization called the "Corresponding Society," and would have succeeded had not Erskine's eloquence called back a spirit of fair play, and secured an acquittal.

Thus, after a long period of development, our judicature came into the possession of the advanced ethics we now know. Is the ground over which this advance has been made securely held? Some of it, surely. Unless we return to a condition equivalent to the half-savagery of the earlier times, some of the advance certainly is secure. Some of it, on the other hand, can be held only more or less precariously, for we have only men on the bench, and they are compounded of the same materials and impulses, world without end; they have not been reconstructed on the basis of ideals. Some frailties are constant.

Was there not an outbreak of frantic justice seen in the prosecution of those accused of complicity in the assassination of Lincoln? And again, was there some of it exhibited in the trials for obstruction and espionage during the excitement of the late war. Moral obliquity, or carelessness or complacency may still let the prejudices of judges, their partisanships, or their fears slip the leash and take control; and the conditions favoring frantic justice will doubtless arise again and again. The title of " Jeffreys " is, perhaps, waiting for some judges of the future, and possibly the human spirit contains the seeds of another Bloody Assize. These are dangers which must, and naturally will, keep judges and lawyers on the alert. Watchfulness of judges over their own fairness will never be unnecessary. And as men tend to harmonize with their surroundings, and the attitude of others, we even have to keep up with care such things as parliamentary behavior in the courts, and for the upkeep small ceremonials may be of greater importance than we usually realize. The impersonal relation of the judge to the case before him is of very great importance, and some of us fear there may be a giving of ground in such a little thing as the drift toward direct personal address to the judge in the course of trial, which is sometimes seen in Balti-

more City. The personal touch in judicature may be a blighting touch. Perhaps it is only by preserving the conception of a court of justice as something larger than the men who carry it on, as something which transcends them, and compels their reverence, that the ground gained through the centuries and left to us of the later generations, can be held secure.

But it is not the purpose of this paper to preach. It is merely a collection of facts, material for reflection and generalization. It is a story of a long climb upward, urged on by inborn practical wisdom and an aspiration, which must dispose us as lawyers humbly to praise the fathers which begat us.

THE NEW COMMERCIAL ARBITRATION ACT

During the discussion in the newspapers and elsewhere of the proposals for a commercial arbitration act during the past session, it became evident that not only the public but many members of the bar thought it was a new proposal for Massachusetts. They did not realize that chapter 251 of the General Laws was entirely devoted to the subject of arbitration and, still less did they realize, that the substance of that chapter had been on the statute books ever since 1786. It may help us to realize the difficulties of inventing and adopting practical methods for "abolishing" the "laws delay" to call attention to the title and the preamble of the arbitration act of 1786, which was chapter 21 of that year. They read as follows:

> "An act for rendering the decision of civil causes, as speedy, and as little expensive as possible. Whereas it is the duty of the Legislature to provide means whereby the decision of civil causes should be as speedy, and attended with as little expense to the citizens of this Commonwealth, as the nature of things will admit. . ."

The fact that we have had a law adopted for the purpose thus stated all these years under which parties could submit their disputes to arbitration after the disputes had arisen and that the statute has been used so little that most of the public and the bar have forgotten its existence naturally leads us to ask why this was so.

Prejudice against arbitration in the minds of many lawyers does not seem a sufficient explanation. Probably the only answer is that, thus far, people have preferred to take their cases into court except those members of well-developed trade organizations who, of course, have been practicing arbitration for years without going near a court or using the statute,—acting simply under their own rules.

As pointed out in this magazine for January, 1924 (page 52), there have been several kinds of arbitration in Massachusetts during this period, one under the statute, one under a common law "rule of court" after a case has actually been entered in court, and one under the contract itself, if it was skilfully drawn in such a way as to make arbitration a condition precedent. The purpose of the recent agitation has been the desire of many business men for a law which would render agreements to arbitrate, *made before any*

dispute has arisen, enforceable even if those agreements were not drawn in such a way as to make arbitration a strict condition precedent. It was in such cases that the common law rule, that the parties could not "oust the jurisdiction of the courts" in advance by agreement, applied.

The recent statute is in two parts, the first part containing amendments of detail of the old arbitration law as to disputes after they have arisen, and the second part rendering enforceable agreements in advance to arbitrate such disputes as may arise later under the contract in which the arbitration clause appears or to which it is collateral.

In drafting this act, as few words as possible were used and in this respect it differs in marked degree from the acts in New York and New Jersey and the recent Federal act. Matters, such as the right to a jury trial on the question whether the arbitration agreement was executed, which were codified in the other acts referred to, were left to be governed by the general principles of law in this new Massachusetts act. The right to such a jury trial in case the execution of the agreement is disputed, is clear in Massachusetts and there was no need of putting it into a statute. The new Massachusetts act also differs from the other acts in retaining some connection with the court, particularly in regard to questions of law, and also in the more specific provisions to secure the impartiality of arbitrators if the act is to apply.

There is nothing compulsory in the act as far as the making of an arbitration agreement is concerned. Nobody needs to make such an agreement but, if they do make it, it is to be lived up to like any other part of the contract. How much use will be made of the act remains to be seen. It will depend largely on the extent to which the commercial organizations succeed in organizing things in such a way that willing, competent and impartial arbitrators are available when wanted. That is the only way in which an extended use of the act is likely to come about. To what extent arbitration agreements will be signed by men who do not realize the effect of such agreements and who may regret it after a dispute arises when they are in a new state of mind, is also uncertain but, as far as practicable without interfering with the scheme of promptness in the settlement of commercial disputes, the rights of such persons, particularly on questions of substantive law, have been guarded more carefully than in any other act of the kind in the country.

For the information of the bar, the act as passed is here

reprinted. For an article on "Commercial Arbitration or Court Application of Common Law Rules of Marketing?" by Wesley A. Sturges, see "Yale Law Journal" for March, 1925, page 480.

F. W. G.

CHAPTER 294. AN ACT RELATIVE TO THE ARBITRATION OF CONTRACTS

(The first 4 sections are amendments of the law as to agreements to arbitrate existing controversies. The substance of this law has been in effect since 1786.)

Be it enacted, etc.

SECTION 1. Chapter two hundred and fifty-one of the General Laws is hereby amended by striking out section two and inserting in place thereof the following:—*Section 2.* The parties in person or by their lawful agents or attorneys shall sign an agreement in substance as follows: Know all men that , of , and , of, , hereby agree to submit the demand, a statement whereof is hereto annexed, (and all other demands between them, as the case may be,) to the determination of and , the award of whom, or of a majority of whom, being made and reported within one year from this day to the superior court for the county of , the judgment thereon shall be final; and if either of the parties neglects to appear before the arbitrators, after due notice given to him of the time and place appointed for hearing the parties, the arbitrators may proceed in his absence. Dated this day of in the year

SECTION 2. Section seven of said chapter two hundred and fifty-one is hereby amended by adding at the end thereof the following new sentences:—In the case of the death of an arbitrator or of his inability or refusal to serve, the superior court shall, upon the application of either party, name an arbitrator in his stead.

SECTION 3. Section eleven of said chapter two hundred and fifty-one is hereby amended by adding at the end thereof the following new sentence:—All expenses of arbitration under this chapter shall be borne by the parties.

SECTION 4. Said chapter two hundred and fifty-one is hereby further amended by striking out section thirteen and inserting in place thereof the following:—SECTION 13. Fees in court shall be the same as for like services relative to an award made under a rule of court.

(The following sections relate to agreements to arbitrate future controversies).

SECTION 5. Said chapter two hundred and fifty-one is hereby further amended by adding after section thirteen the nine following new sections:—

SECTION 14. The parties to a contract may agree in writing that any controversy thereafter arising under the contract which might be the subject of a personal action at law or of a suit in equity shall be submitted to the decision of one or more arbitrators.

SECTION 15. Such an agreement may either name the arbitrator or arbitrators or may define the method by which an arbitrator or arbitrators are to be chosen. In case of the death, inability, or refusal to serve of any person so named, or in case the method of choosing arbitrators prescribed by the parties becomes impossible of performance because of the default of one of the parties or otherwise, or in case such agreement fails either to name or to provide a method for choosing an arbitrator or arbitrators, the superior court shall upon the application of either party, name an arbitrator or arbitrators.

SECTION 16. If a party to the contract be named as arbitrator, or the agent or agents or employee or employees of any one party to the contract be named in the contract or selected by the method therein defined as sole arbitrator or as a majority of the arbitrators under such agreement, the provisions of sections fourteen to twenty-two, inclusive, shall not apply.

SECTION 17. The submission shall be made within six months, unless otherwise stipulated by the parties, but in no event within less than reasonable time, after due notice by any party to the contract claiming the arbitration of any controversy thereunder.

SECTION 18. If any one of the parties neglects to appear before the arbitrators after due notice is given to him of the time and place appointed for hearing, the arbitrator or arbitrators shall proceed in his absence.

SECTION 19. The award of the arbitrator, or of a majority of the arbitrators, being made and reported to the superior court within one year from the date of the submission or within such further time as the court may upon the application of the arbitrator or arbitrators allow, the judgment thereon shall be final.

SECTION 20. Any question of law may, and upon the request of all parties shall, be referred by the arbitrator or arbitrators to the court to which the report is to be made. Upon application by a party at any time before the award becomes final under section nineteen, the superior court may in its discretion instruct the arbitrator or arbitrators upon a question of substantive law.

SECTION 21. If any suit or proceeding be brought upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of either the plaintiff or defendant stay the trial of the suit or proceeding until such arbitration has been had in accordance with the terms of the agreement; provided, that the applicant for the stay is ready and willing to submit to arbitration.

SECTION 22. Proceedings under sections fourteen to twenty-

one, inclusive, shall be governed by the provisions of sections six to thirteen, inclusive, not inconsistent therewith.

SECTION 6. This act shall not apply to contracts made prior to the taking effect hereof.

Approved April 29, 1925.

Note.

The act seems to have taken effect 30 days from April 29th, as it "relates" to "the powers of courts" under the Initiative and Referendum Amendment and thus seems to come within the "excluded matters," so that the 90-day clause does not apply.

[CHAP. 18.]

RESOLVE PROVIDING FOR AN INVESTIGATION RELATIVE TO THE PROVIDING OF ADDITIONAL ACCOMMODATIONS FOR THE SUPREME JUDICIAL COURT AND OTHER COURTS, FOR THE CLERKS AND REGISTERS OF SUCH COURTS, FOR CERTAIN OFFICIALS OF SUFFOLK COUNTY, AND FOR THE SOCIAL LAW LIBRARY.

Resolved, That a special unpaid commission, consisting of four persons to be appointed by the governor, and the sheriff of Suffolk county, ex officio, is hereby established for the purpose of studying and investigating into the present accommodations and needs and the probable future needs of the supreme judicial court, whether sitting for the commonwealth or for the county of Suffolk, the superior court for the county of Suffolk, the offices of the clerks of said courts and their assistants, the probate court for Suffolk county and the registry connected therewith, the land court and the office of the recorder thereof, the municipal court of the city of Boston and the Boston juvenile court and the offices of the clerks of such courts, the reporter of decisions, the social law library, the registry of deeds, the district attorney's office and the offices of such other officers of Suffolk county as are now located in the Suffolk county court house. Members of said commission may expend for clerical and other assistance and for the expenses of such investigation out of such amount not exceeding three thousand dollars as may be approved by the governor and council. Of the amount expended under the provisions of this resolve, two thirds shall, within a reasonable time after the state treasurer sends written request for the same to the treasurer of the city of Boston, be paid to the commonwealth by the county of Suffolk from any funds available therefor. The commission shall make a report to the general court by filing the same, together with drafts of such legislation as may be necessary to carry out its recommendations, with the clerk of the house of representatives not later than December fifteenth of the current year. *Approved April 16, 1925.*

THE MINORITY JUROR AND JUDGE HOAR'S CHARGE IN COMMONWEALTH *v.* TUEY

From the Boston Post, June 3, 1925.

The case of Juror Andrew, who stood out for conviction in the Macri murder case at New Haven, has attracted wide attention. The Connecticut Bar Association has severely denounced the treatment accorded Mr. Andrew in the attempt to force him to agree with the other jurors.

The State of Massachusetts is in a peculiar position on this very subject of coercing jurors.

Many years ago, in the case of the Commonwealth vs. Tuey, Judge Hoar, one of our most eminent jurists, was annoyed over the failure of the jury to agree on a conviction within a reasonable time. He sent for the jury and in carefully chosen language instructed them that it was the duty of the minority to consider carefully the arguments of the majority, and, without surrendering their personal right of opinion, to see if they could not agree with the majority.

That instruction was effective. The jury looked upon it for what it was, a plain intimation that the majority was probably right.

The Supreme Court of that day upheld this instruction.

Since then, at various times, judges have called in balky juries and read the decision to them. Many times it has resulted in verdicts when juries seemed hopelessly deadlocked.

Our Supreme Court has, however, been extremely uneasy over this ruling as laid down by Judge Hoar. It has not hesitated to characterize it as "going to the extreme limit" and as a decision which "many able jurists think exceeds the limit of judicial instruction."

So touchy are the Supreme Court judges over it that other Superior Court judges who attempted to put in their own words the gist of Judge Hoar's ruling have suffered reversal at the hands of the Supreme Court. Only the very remarkable ingenuity of language possessed by Judge Hoar has kept his ruling the law of the State up to the present.

There are times when a stubborn juror performs a most valuable service. Our jury system is based on the individual opinions of 12 men on the evidence at the trial. No man should be asked to sur-

render his honest opinion merely to prevent the jury from reporting a disagreement. A disagreement is very often a most unsatisfactory outcome of a trial, but an agreement forced by the coercion of the minority is a repugnant one.

The Massachusetts ruling, as the Supreme Court has twice remarked, "goes to the extreme limit." It seems, to the layman, to offer too much support to jury majorities. To lawyers and judges the careful language of Judge Hoar and the profound skill with which he avoided the direct language (which would have meant a reversal) may seem reasonable.

Still it is quite easy to conceive the effect of it on men unlearned in the law and to realize how greatly it tends to weaken the position of a minority juror, however firmly he is convinced he is right.

Note.

There is no question that a juror who has a real opinion and is strong enough to stand by it performs a valuable service in the community. The public realization of this fact is, and has been, the reason for our constitutional requirement that a verdict shall be unanimous instead of the provisions for majority verdicts which have been adopted elsewhere, but, in view of the editorial criticism above quoted from the "Post" of the instruction given by Judge Hoar to the jury in *Com.* v. *Tuey* (8 Cush. 1) the full report of that instruction as it is given in the report of the case is here quoted for the purpose of discussion. The charge was as follows:

> "The only mode, provided by our constitution and laws for deciding questions of fact in criminal cases, is by the verdict of a jury. In a large proportion of cases, and perhaps, strictly speaking, in all cases, absolute certainty cannot be attained or expected. Although the verdict to which a juror agrees must of course be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor, and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve more intelligent, more impartial, or more competent to decide

> it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In order to make a decision more practicable, the law imposes the burden of proof on one party or the other, in all cases. In the present case, the burden of proof is upon the commonwealth to establish every part of it, beyond a reasonable doubt; and if, in any part of it, you are left in doubt, the defendant is entitled to the benefit of the doubt, and must be acquitted. But, in conferring together, you ought to pay proper respect to each other's opinions, and listen, with a disposition to be convinced, to each other's arguments. And, on the one hand, if much the larger number of your panel are for a conviction, a dissenting juror should consider whether a doubt in his own mind is a reasonable one, which makes no impression upon the minds of so many men, equally honest, equally intelligent with himself, and who have heard the same evidence, with the same attention, with an equal desire to arrive at the truth, and under the sanction of the same oath. And, on the other hand, if a majority are for acquittal, the minority ought seriously to ask themselves, whether they may not reasonably, and ought not to doubt the correctness of a judgment, which is not concurred in by most of those with whom they are associated; and distrust the weight or sufficiency of that evidence which fails to carry conviction to the minds of their fellows."

The propriety of this charge came before the full bench of the Supreme Judicial Court upon the defendant's objections after a verdict of "Guilty" in 1851. The court then consisted of: Lemuel Shaw, Chief Justice; Theron Metcalf, Richard Fletcher, and George T. Bigelow (later chief justice). The opinion was written by Mr. Justice Bigelow and was concurred in by the other judges as follows:

> "The defendant objects to the instructions given to the jury in this case, on the ground, that they were equivalent to a direction, on the part of the court, to a minority of the jury to yield their own opinions and judgment to the views of the majority, and render a verdict in conformity therewith; or, in other words, that a dissenting juror was bound to take into consideration the opinions of his fellows, as an element by which his own convictions were to be controlled. But we do not so understand the purport and effect of the language used by the judge who tried the case. The instructions went no further, than to say, that if any of the jury differed, in their views of the evidence, from a large number of their fellows, such difference of opinion should

induce the minority to doubt the correctness of their own judgments, and lead them to a re-examination and closer scrutiny of the facts in the case, for the purpose of revising and reconsidering their preconceived opinions. In this view, the court did nothing more than to present to the minds of the dissenting jurors a strong motive to unanimity.

Upon a careful consideration of these instructions, we are clearly of opinion, that so far from being improper, or of a nature to mislead, they were entirely sound, and well adapted to bring to the attention of the jury one of the means by which they might be safely guided in the performance of their duty. A proper regard for the judgment of other men will often greatly aid us in forming our own. In many of the relations of life, it becomes a duty to yield and conform to the opinions of others, when it can be done without a sacrifice of conscientious convictions; more especially is this a duty, when we are called on to act with others, and when dissent on our part may defeat all action, and materially affect the rights and interests of third parties. Such is the rule of duty constantly recognized and acted on by courts of justice. They not only form their opinions, but reconsider, revise, and modify their own declared judgments, by the aid and in the light of the decisions of other tribunals. But this could not be done if it were not permitted to them to doubt and correct their opinions, when they were found to differ from those of other men, who have had equal opportunities of arriving at sound conclusions with themselves.

The jury room is, surely, no place for pride of opinion, or for espousing and maintaining, in the spirit of controversy, either side of a cause. The single object to be there effected is to arrive at a true verdict: and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other. By such means and such only, in a body where unanimity is required, can safe and just results be attained; and without them, the trial by jury, instead of being an essential aid in the administration of justice, would become a most effectual obstacle to it." (8 Cushing 2-3).

When the instruction of Judge Hoar is read and considered in the light of the foregoing opinion sustaining it, is there really any sound reason on which even laymen should criticize it? The theory of the jury system as it has developed, both in England and in this country as one of the free institutions in a free country, is that the jurymen have intelligence and independence enough to consider the evidence and form their own opinion.

As a practical matter, does not the criticism in the editorial above quoted in the language of Chief Justice Tawney of the Supreme Court of the United States in *Mitchell* v. *Harmony, 13 How. 420* "question the [jurors'] intelligence and independence; . . . which can not be brought into doubt without taking from that tribunal the confidence and respect which so justly belongs to it in questions of fact,"?

While it is true that Judge Hammond in *Highland Foundry Co.* v. *N. Y., N. H. & H. RR.* 199 Mass. at 407 stated that the case of *Com.* v. *Tuey* "generally has been regarded by the profession as going nearly, if not quite, to the extreme limit" that remark even if correct, is not a criticism but simply a description and while it is also true, of course, that in charging a jury in such a matter a judge is always "treading on delicate ground" and must choose his words with care, yet, as Judge Hammond also said, "perhaps no case in our reports is more familiar to the trial bar than *Com.* v. *Tuey.*" The fact that it has stood the test of about 75 years of practice indicates Judge Hoar's sound practical sense in his choice of words.

Similar instructions taken from Judge Hoar's charge and used in a criminal case in the Federal Courts, *Allen* v. *U. S.* 164 U. S. at p. 501, were unanimously sustained by the Supreme Court of the United States in 1896. That court said in the opinion by Mr. Justice Brown:

> "While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury-room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It certainly cannot be the law that each juror should not listen with deference to the arguments and with a distrust of his own judgment, if he finds a large majority of the jury taking a different view of the case from what he does himself. It cannot be that each juror should go to the jury-room with a blind determination that the verdict shall represent his opinion of the case at that moment; or, that he should close his ears to the arguments of men who are equally honest and intelligent as himself. There was no error in these instructions."

F. W. G.

DELAY AND EXPENSE AS A RESULT OF "IMPLICATION" FROM THE PRINTED RECORD.

The case of Norcross v. Haskell, Executor, decided on January 30, 1925, Advance Sheets page 219, was fully tried before an auditor, who found for the defendant. The defendant filed a motion under Rule XXX of the Superior Court for entry of judgment on the auditor's report. The plaintiff then filed a motion to be allowed to claim a jury trial about two years after the case was entered. The docket entry showed that the motion for jury claim was set for hearing. We are informed that as a matter of fact, at that hearing the motion for judgment on the auditor's report was heard at the same time by agreement of counsel. This fact did not appear in the printed record. After hearing on both motions, the judge denied the jury claim and ordered judgment on the auditor's report for the defendant but he phrased his order as follows:

> "February 16, 1924. No jury claim having been filed, plaintiff's motion to be allowed to file jury claim having this day been presented and heard by me and denied, and no alternative request having been presented that the cause be heard by a judge sitting without jury, the within motion is allowed and judgment ordered entered for the defendant."

The plaintiff with new counsel, who was not, apparently, present at the hearing of the motion, appealed from this order on the ground that the record did not show that the rule had been complied with or that there had been a hearing on the motion for judgment. The case was not argued orally, but was *submitted on briefs.*

The plaintiff's brief contained the argument,

> "Since the order speaks of a hearing on the plaintiff's motion and omits all reference to any hearing on the defendant's motion, it is submitted that the only proper inference that may be drawn from this is that the hearing specified, namely, upon the plaintiff's motion for leave to file a jury claim, was the only hearing had."

The defendant's brief consisted in substance of the following quotations from two cases; first, in *Allis-Chalmers Mfg. Co.* v. *Frank Ridlon Co. 248 Mass. 41,* a plaintiff filed a motion for judgment on an auditor's report.

> "The motion was allowed on July 18, 1923. On July 20 the judge of the Superior Court filed this Finding:— The court finds for the plaintiff on the auditor's report and assesses damages," etc. "Defendant appealed from the order and finding of July 20."

> "The case comes before us on appeal. It is assumed in favor of the defendant that the appeal is rightly here. It was decided in *Samuel* v. *Page-Storms Drop Forge Co.* 243 Mass. 133, 134, that under G. L. c. 231, s. 96, 'appeal now is available as a means for bringing to this court for review errors of law alleged to have been committed by the Superior Court in civil actions or proceedings at law in only three instances: First, where an order has been entered sustaining or overruling a demurrer on the ground that the facts pleaded do not in law support or answer the action; Second, where an order for judgment has been entered on a case stated, and Third, where an order has been entered 'decisive of the case founded upon matter of law apparent on the record.' Manifestly the case at bar cannot fall within either the first or second class of cases thus enumerated. It does not come within the third class of cases. The printed record does not show that the Superior Court failed to conform to the provisions of Rule 30. For aught that appears, the judge may have held a hearing after reasonable notice upon the motion for the entry of judgment according to the auditor's report in which both parties participated, and decided upon sufficient evidence and in accordance with correct rules of law that no cause appeared or was shown why judgment should not be entered on the auditor's report. No matter of law is apparent on the record in this particular decision of the case. If any error of law was thought by the defendant to have been committed by the trial judge in dealing with the motion for judgment in accordance with the auditor's report, that alleged error ought to have been embodied in a bill of exceptions setting out in detail the facts, rulings of law, and steps in the procedure. It cannot under the statute and decision just cited be raised by way of appeal on such a record as the present."

The second case relied on by the defendant was *Wheeler* v. *Tarullo 237 Mass. 306*, in which the court overruled exceptions to an order for judgment and said,

> "Where a party does not persist in or rely upon his seasonably claimed right to a jury trial or waiving that claim does not ask that the case be heard by a judge, a proper case is presented for disposition on a motion for judgment upon an auditor's report."

Relying on these statements of the court the defendant's brief asked for double costs on the ground that the appeal was frivolous.

The full bench reversed the judgment on the ground that a hearing on the motion for judgment was essential; that the only hearing disclosed by the record was on the motion for jury trial, and said:

> "The statement in the order of the judge to the effect that there was a hearing on one motion and that another motion was disposed of without any statement that there was a hearing, carries the implication that there was no hearing on the second motion.
>
> "2. The reason given for granting the motion was wrong. The rule does not require that a party, against whom an auditor has made findings, must make an 'alternative request' for further hearing before the Court when motion for judgment has been filed. The most that is required, and this only by inference, is that he seasonably assert his right at such hearing. . . But here the implication of the record is that there was no such hearing. . . . The state of the record in the case at bar distinguishes it from *Allis-Chalmers Manufacturing Co.* v. *Frank Ridlon Co. 248 Mass. 41.*"

The case went back to the Superior Court and was entirely retried before a judge without a jury in a trial, which took a week of the time of the judge and counsel on both sides with the incidental expenses both to the parties and to the Commonwealth. The judge found for the defendant just as the auditor had done.

Why the court should assume that the order of the Superior Court judge above quoted "carries the implication that there was no hearing on the second motion" when the order itself dealt with the subject of the second motion, is not clear. It would seem that the Superior Court judge is entitled to exactly the opposite implication, at least to the extent which should lead the full bench to ascertain from counsel and the judge of the Superior Court whether or not there was a hearing in fact, instead of assuming that he acted wrongly and consequently putting not only the Commonwealth, but both parties, particularly the defendant, to the delay and expenses which resulted in this case.

The record could have been discharged for correction if necessary; the fact when ascertained could have been added to the record. Of course, the Superior Court judge should have been more careful as to detail in drafting this order, but, in the rush of business such things are bound to be overlooked occasionally. There seems no reason why the parties should be penalized, particularly the prevailing party, to the extent shown in this case simply because of an inadvertent technical omission in the order of the judge and an inadvertent omission by the clerk to note upon the docket the fact of hearing when the whole thing could have been ascertained by simple inquiry of the judge. It seems to be the sort of thing which should be ascertained, or as to which inquiry should

be directed by the full bench, on its own motion before deciding the case. Of course, this suggestion does not mean that the court should not expect, and require, care in the preparation of the record and, in this respect, the decision on the appeal in the *Allis-Chalmers* case, above mentioned, may be sustained because there the defendant was trying to upset on appeal the order of judgment for the plaintiff and the record did not show enough to upset it. It is noticeable, however, that in that case the court seems to have made exactly the opposite implication from the record on appeal from that which was made in the *Norcross* case for the court said in the Allis-Chalmers case, "For aught that appears, the judge may have held a hearing after reasonable notice upon the motion for the entry of judgment." (See passage quoted above; cf. also *Woogmaster* v. *Cutler,* decided May 23, 1925, Adv. Sheets 1191-3.)

This note is written as a respectful suggestion to the full court, based upon the history of a case after it left their hands which came to our attention by accident. (Cf. G. L. Ch. 231, §125 and Report Committee on Legislation Mass. Bar Assoc. for 1913, p. 35.)

F. W. G.

[CHAP. 27.]

RESOLVE PROVIDING FOR INVESTIGATION BY JUDICIAL COUNCIL OF WAYS AND MEANS FOR EXPEDITING THE TRIAL OF CASES AND RELIEVING CONGESTION IN THE DOCKETS OF THE SUPERIOR COURT.

Resolved, That the judicial council is hereby requested to investigate ways and means for expediting the trial of cases and relieving congestion in the dockets of the superior court, and, among other things, the advisability of increasing or of wholly removing the ad damnum limits of district court jurisdiction in civil cases; measures for discouraging frivolous appeals; measures for requiring parties to frame issues in advance of trial by greater specification in the declaration of what the plaintiff in good faith claims and greater specification in the answer of what the defendant admits or in good faith denies, with suitable penalties for frivolous or unfounded allegations and denials; ways and means for encouraging, so far as consistent with constitutional rights, trials without jury, including specifically an inquiry into the operation of the laws of Connecticut and Maryland relative to the waiver of jury trials in criminal cases; and any other ways and means that may appear feasible to said council for improving and modernizing court procedure and practice so that, consistently with the ends of justice, the proverbial delays of the law and attendant expense, both to litigants and the general public, may be minimized. *Approved April 24, 1925.*

The Judicial Council was created for "the continuous study of the judicial system." Suggestions may be sent to F. W. Grinnell, secretary of the Council, 60 State St., Boston.

THE DETERRENT PRINCIPLE OF THE CRIMINAL LAW

1. The Issue between the Psychiatrists and the Law.
2. The Shifting Emphasis in Public Opinion About Crime.
3. Dr. Charles F. Folsom's "Studies of Criminal Responsibility and Limited Responsibility."
4. Should There Not be a New Classification of Offenses?
5. The New Federal Probation Act and the Importance of the Deterrent Principle in Connection with the Administration of Probation Acts Generally.

The Issue Between the Psychiatrists and the Law

In the February number we reprinted Dean Wigmore's comments on the sentence in the Loeb-Leopold case in which he discussed the "retribution" theory, the "reformation theory," and the "deterrence" theory and emphasized the last as "the kingpin of the criminal law." We were criticized for printing Wigmore's comments without presenting other views of the matter and we were referred to the November number of the "Journal of the American Institute of Criminal Law and Criminology," which contains a condensation of the Loeb-Leopold case prepared with the co-operation of counsel for the prosecution and for the defense, as follows:

A A Brief Chronology of Events.
B The Crime and its Detection; a Memorandum Summary.
C Joint Summary Report of Psychiatrists for Defence, Dr. William A. White, Dr. William J. Healy, Dr. Barnard Glueck, and Dr. Ralph Hamil.
D Opinions of Psychiatrists for Prosecution, Dr. Hugh T. Patrick, Dr. Harold Douglas Singer, Dr. Archibald Church, and Dr. William O. Krohn.
E Judge's Sentence.
F Comments on the Sentence from the Legal Profession by Chief Justice Olson of the Chicago Municipal Court, Homer Cummings, States Attorney for Fairfield County, Conn., and Dean Wigmore.

Following this in the February number of the same Journal appear comments on views of the lawyers by Dr. H. L. Gosline and comments on Dr. Gosline's comments by Dean Wigmore.

Having read all these, we recommend them to every man interested in the criminal law and its administration. They cover only about sixty pages in all. Perhaps the practical issue is sufficiently suggested by the following extract from Dr. Gosline's paper. He refers to the statement of one of the lawyers that "whether crime is always an evidence of disease and should be treated instead of punished is an interesting speculation" and continues:

> "Of course, this is the biological point of view, and it must be particularly annoying to some to have such views so clearly expressed by one of the legal profession, even for the purpose of criticizing them.
>
> "Let us turn to the opinion of Dean Wigmore, who is clear as ever and forceful enough to arouse opposition. Let us consider the deterrence theory, which he rightly terms the 'kingpin of the criminal law.' We will not attack this theory from the usual angle, that it 'fails to deter'. I want to attack it on the ground that deterrence itself is bad 'in the long run' because it does not *cure*, because it only represses, and because it dams back and causes to fester in the body politic. It is good surgery to empty pus, and it is good social surgery to bring things to light. Old methods have almost always forced to cover! Following this view, it is good to take the lid off. It may be a nasty mess at first, just as opening a great pus pocket is a nasty mess. But the time is about ripe to perform some good social surgery, undoing and setting right the poor social surgery done by our non-biologically trained brethren, the legal profession, who, after all, have been dealing with a biological problem for which they are untrained and in which they are unlearned.
>
> "The sooner we perform such an operation, the sooner shall we find out who is socially unfit—who should be locked up (perhaps for life; at least until he is cured; not for three to five years)—whom we should quit breeding with.
>
> "Of course this is Determinism (with a capital 'D', as our good friend spells it). But the psychiatrist, who is the determinist, is going to do much more for 'social self-defense' than the 'measures of the modern penal law' now do. It is a false statement, whether a psychiatrist made it or not, that 'we try to help criminals to get through the situation!' What psychiatrists are trained to do is to prevent 'weeds' ever growing in our 'garden' as well as to keep weeds out of your garden after you find them there.

> It never asks that the 'most dangerous criminals should be given indulgence.' True, it asks that they be treated humanely, but it asks that they be treated as sick men, and that means that they should be locked up under psychiatric care and treatment 'until they are well.' The result would be that most of them would stay for life—there would be very little more of this three to five year business, which is just as silly as to send a case of typhoid fever to the hospital for three weeks whether he gets well or not.
>
> "And which would be the greater deterrent to crime, say, you learned gentlemen, if this kind of treatment should become generally known as the accepted modern treatment for the criminal—to be locked up until he is well?"

Dean Wigmore answers:

> "Cure the sick men? Yes, if you can get all of them under control in time. But if the machinery of the criminal law is all to be scrapped because it is misguided, and is to be replaced by hospitals, then what becomes of the Cure theory if the other thugs burn down the hospitals and kill the doctors before the cure is performed?"

In an interesting little book called, "A Generation of Judges," published about the end of the nineteenth century, there is a story told of Mr. Justice Byles, who, because he was the author of a standard book on the law of negotiable paper before he became a judge, was commonly referred to as "Byles on Bills."

> "Once when he was trying a prisoner for stealing, a medical witness was called, who said that in his opinion the accused was suffering from kleptomania, 'and your lordship, of course, knows what that is.' 'Yes,' said Byles quietly, 'it is what I am sent here to cure.'"

The Shifting Emphasis in Public Opinion About Crime.

It is, of course true, that the theory of the criminal law developed from the private "vengeance" of primitive people through the mixture of "vengeance" and "deterrence" or the social "self-defense" idea, to the present theory, which is a mixture of "vengeance," "Deterrence," "cure," and humanitarianism, with the emphasis on one or the others of these elements, shifting from time to time in public opinion as a result, partly of conditions and partly of dramatic instances. Common sense about human nature teaches us that this mixture, with shifting emphasis, will continue indefinitely in all large communities, no matter how much the rules and

administration may improve, so that it must be accepted as a basis for practical thinking. A temperately written little book by a "psychiatrist" seems to be Dr. William A. White's "Insanity and the Criminal Law," published by MacMillan. The question is, to what extent can the doctors help to protect the community by gradually improving deterrent methods along the lines of treatment and cure and in the face of the inevitable recurrence of a public opinion containing a strong mixture of vengeance, which is apt to interfere by law with their methods. A striking illustration of the "shifting emphasis" to which we have referred appears in the following news from Maine which appeared in the "Boston Post" of June 22, 1925.

MOVE ON TO RESTORE CAPITAL PUNISHMENT IN MAINE

AUGUSTA, ME., June 21.—Capital punishment may be restored in Maine by the Legislature as the result of a popular movement which is rapidly gaining ground throughout the State. Under the present law, murderers convicted in the first degree must be sentenced to life imprisonment. A bill to repeal this feature of the State law and require that all persons convicted of murder in the first degree must be sentenced to death was introduced in the last Legislature, and defeated after a close contest.

AROUSED BY CRIME

The movement to get a similar bill through the present Legislature is the direct result of the popular indignation aroused by the recent abduction and murder of Miss Aida Hayward of Winthrop, Me. Harry A. Kirby of Winthrop is now held in Augusta County Jail for the September term of the grand jury. On June 3 Kirby made a full and voluntary confession to a reporter of the Boston Post staff that he abducted and murdered Miss Hayward, burned her summer camp at Lake Maranacook and attempted to murder her aunt, Mrs. Emma Mabel Townes, who is now convalescing from her wounds at her brother's home in Winthrop. The State and County authorities, aided by a private detective from Boston, had abandoned efforts to secure a confession from Kirby after five days of continual inquisition and investigation.

Since the crime was committed, sermons have been preached in Maine churches strongly advocating the restoring of capital punishment in the State, and newspaper editors have written strong editorials making similar recommendations. There was opposition to the bill before the last Legislature from the same pulpits where on recent Sundays clergymen have declared their strong conviction that death is the only suitable penalty for the terrible crimes of which Kirby admitted his guilt.

At the request of a member of the Legislature, Judge Herbert E. Foster of Winthrop assisted the attorney general in drafting the bill restoring capital punishment which was introduced before the last Legislature by Representative Ellsworth Piper of Jackman.

It is agreed by legal authorities that such a bill cannot be made retroactive, so that the most severe penalty which can be meted out to Kirby is life imprisonment. According to common report here at the State House Senator Wadsworth of Winthrop and Judge Foster are among the leaders in the latest movement to amend the State law and restore capital punishment to the Maine statutes.

Dr. Charles F. Folsom's "Studies of Criminal Responsibility and Limited Responsibility"

This little book deserves attention in connection with the current discussion. Dr. Folsom was one of the leading men in his profession with a long and varied experience, in private practice; as visiting physician for nervous diseases at the Boston City Hospital; as a teacher at the Harvard Medical School on mental diseases; and as secretary of the Massachusetts State Board of Health. He was one of the doctors who examined Guiteau after the assassination of President Garfield. The book contains his studies of the cases of Jesse Pomeroy, Charles Julius Guiteau, Marie Jeanneret, Christiana Edmunds, Sarah Jane Robinson, and Jane Toppan, and is described in the "Preface" as follows:

> "The following Studies of Criminal Responsibility and Limited Responsibility are based upon six cases to which Dr. Folsom had given much time and thought. They were found among his papers after his death in August, 1907. They were grouped together and had been more or less carefully revised, evidently for the purpose of publication at some time. Indeed he had expressed such an intention in a general way to his wife and to one or two intimate friends. Some of the studies have been previously published in medical periodicals. Some of them doubtless would have undergone still more careful revision at Dr. Folsom's hands had he lived. They are privately printed now for circulation among professional and other friends.
>
> "These studies testify to his earnestness and zeal in elucidating questions which interested him through many years, and his steadfast attitude towards some problems nearly affecting the welfare of society."

The first paper opens with the following sentence:

> "In speaking of the duty of the expert who is called upon to testify as to the insanity of any individual who has committed a crime, Conolly says, 'His business is to declare the truth; society must deal with the truth as it pleases.' "

The last and latest paper closes as follows:

> "I need not further mention or discuss the cases of Christiana Edmunds and Marie Jeanneret, which I have reported in some detail, two women of obviously unsound mind, and generally known to be such long before their crimes were committed, except to say that I do not believe that two cases can be found in medical literature or court records which better illustrate the conditions which have been misnamed moral insanity.
>
> "It is not difficult to hold the position that every one is of unsound mind who is out of sympathy with the moral conceptions of his time, as Aristotle said twenty-three centuries ago: *Αδυνατον φρόνιμον εἶναι μὴ ὄντα ἀγαθν*, of which a liberal translation is that depravity is of itself evidence of mental unsoundness. In a similar argument, I have heard the view maintained that extreme goodness may be an indication of defective brains by reason of the lack of judgment and wisdom that may go with it, to say nothing of its disposition to morbid views; and Lecky's History of European Morals has been quoted to show the vast amount of harm that has been done in the world by good people who followed their consciences without sense and reason. It is easy to argue, therefore, that criminal laws are made for people of unsound mind and that the sane will behave well without such laws. But responsibility in persons of weak morals or mentals is as much a matter of knowledge of humanity and common sense as of medical definitions, and the safety of the community depends upon not lowering its standard of behavior too far.
>
> "If the United States law prevailed in the several states by virtue of which the verdict for murder in the first degree may be death or life imprisonment, the criterions of responsibility could hardly be placed too high, even for what is termed moral insanity, in the protection of society, and to further that high degree of accountability which every thoughtful person's experience satisfies him is best for the individual as well, besides being fully justified by its success in the various movements to reform criminals and juvenile offenders.
>
> "In that immortal poem, the Bhagavad Ghita, the song celestial, Prince Arjuna asks of the Supreme Being:

'Yet tell me, Teacher; by what force doth man
Go to his ill, not freely, as if one
Pushed him that evil path?'

"Krishna answers:

'Kama it is!
Passion it is! born of the Darkness,
Which pusheth him. Mighty of appetite,
Sinful and strong is this!—man's enemy. . . .
The wise fall, caught in it; the unresting foe
It is of wisdom, wearing countless forms,
Fair but deceitful, subtle as a flame.
Sense, mind, and reason—these, O Kunti's son!
Are booty for it.'

"In some cases, it may be simply a matter of expediency whether a wrong-doer is labeled responsible or irresponsible.

"To the careful student of Prichard's moral insanity and of Ray's moral mania, many, at least, of their cases are clearly simple mania, in which the moral perversion is only an incident or symptom. . . .

"The convict who was asked by Lombroso whether he should return to a life of crime after his sentence had expired answered that Lombroso might have his brain examined after he was dead. Lombroso's convict [and others] found in crime the fun and excitement which they could not get out of anything else, and that was the way they liked best of making their money and gratifying their passions, so that they kept on taking their chances."

In the "Case of Marie Jeanneret," which was also printed in the "American Law Review" for November-December, 1908, page 801, Dr. Folsom begins:

"Of the three assigned chief causes of the premeditated crime, pleasure, greed, and intoxication, perhaps it is not altogether an accident that pleasure has been placed first. The whole world amuses itself, when it is not shocked or horrified, with the different and often inconsistent ways in which people seek the gratification of their instincts or emotions, their senses or passions, and at the queer sacrifices which they make of time, money, or conscience to carry out their desires. The unusual or unnatural sources of pleasure, especially such as involve injury, pain, suffering, or distress, whether given or received, have constituted a study of profound interest to the philosophers and moralists from Plato to Stanley Hall."

In the same paper he concludes:

"Authority and precedent, which at least among English-speaking people aim to voice the common law and common sense, in the main have held such people responsible for their criminal motives and acts; and they are supported thus far by the predominating weight of expert medical opinion, although individual views differ regarding them. There is another class of individuals, of which I will report some cases at a future time, in whom there is no evidence of irresponsibility outside of their criminal acts, and none indicated or suspected before them, where the question of insanity lies in the answer to the inquiry whether or how far there is in the crimes themselves inherent evidence of mental unsoundness. . . .

"I should like to propose . . . an amendment to our laws so that the punishment for murder in the first degree shall be death or imprisonment for life, at the discretion and judgment of the jury, with such instructions as the courts may give them—thereby following the precedent of the recent change in the United States Law, even if not quite attaining to the admirable provisions of the French code.

"If we could at the same time eliminate from our nosology and more particularly from our jurisprudence the term moral insanity, we should confer a boon on the medical profession and the world at large like that which came from abolishing Jonathan Edwards' original sin.

"Of course, it was not many thousand years ago that all men were criminals, according to our present standard. Crime, to quote Anatole France, was the nurse of the human race; it fed and covered and housed them. Some of us, through centuries of breeding, have outgrown the grosser forms of crime, but the criminal instinct is well-nigh universal. If we sound deep enough, said our greatest American poet, we come to the mud of human nature; and if it were not for established laws and the force of public opinion and our own incessant and watchful efforts to be decent, our temptations and opportunities would be running riot with what we call our morals. Let the best of us once begin yielding to our lower impulses, and let us keep on and escape detection long enough, and the merest tyro could cast our horoscope.

"What can organized society do in the matter for its safety, or even its very existence, but first and foremost maintain a high standard of responsibility and at least keep its own head sane?"

These passages quoted are alone sufficient to command attention and the book, as a whole, is an exceptionally helpful contribution of balanced judgement.

Should There Not Be a Reclassification of Offenses?

Among other discussions in the "Journal of Criminal Law and Criminology" for November appears a letter from Robert J. Wilkin, Justice of the Children's Court of New York, which deserves attention. He says:

> "It may be true that lack of adequate punishment, too much undeserved sympathy and maudlin sentiment has interfered with the administration of the criminal law, but it has appeared to the writer that one of the most important items in connection with the present apparent breaking down of civil government, insofar as the control of unlawful acts is, that the whole structure has been honeycombed with the wrong sentiment.
>
> "The point in mind is that it no longer is very reprehensible to be a convicted criminal, for there is no adequate description of him.
>
> "The Penal Law provides that crimes are divided into felonies and misdemeanors. It describes felonies and then says, 'all else are misdeameanors.' Certain civil disabilities follow one convicted of a crime. Now what do our laws describe as some of the crimes?
>
> "Every violation of police regulations is a crime, as for instance, parking one's car on the wrong side of a street, etc., violations of health, or sanitary ordinances; failing to record a marriage within a certain time, etc., and thousands of other simple acts, many times innocent in themselves but, because prohibited, then criminal. Does not 'familiarity breed contempt'? If real serious offensive acts were charged as crimes, felonies and misdemeanors and properly dealt with, if acts seriously affecting the rights of others, or involving moral turpitude were treated as crimes, and if violations of prohibitions were only treated as such, is it not likely the criminal law would receive greater respect and the community be better protected?
>
> "If a person forgets to carry his license to drive his automobile, it is a crime, although he never has affected the rights of any one, it still is a misdemeanor or a crime and he, if he is punished after being haled to court, is forever after a convicted criminal.
>
> "Would it not be a real benefit to denominate those who have injured others as criminals and to make a legal

> distinction between them and those who have done only some prohibited act; innocent in itself, but still prohibited. The idea is not new, but it is relevant at this time when the criminal law seems to be tottering."

THE NEW FEDERAL PROBATION ACT AND THE IMPORTANCE OF THE DETERRENT PRINCIPLE IN CONNECTION WITH THE ADMINISTRATION OF PROBATION ACTS GENERALLY.

The "equitable" development of criminal administration was discussed at length in an article in this magazine for August, 1917, under the title, "Probation as an Orthodox Common Law Practice in Massachusetts Prior to the Statutory System". That discussion was called forth by the decision of the Supreme Court of the United States in the Killits case, which stopped the probation practice of the Federal Courts, not only as it was mistakenly administered in Ohio and some other parts of the country, but as it had been administered here in the First Circuit for at least sixty years in accordance with the common law traditions and practice of Massachusetts. The effect of the Killits decision has just been overcome by the passage of a Federal probation act.

In describing the modern practice as "equitable", I have used a word which was used in connection with a somewhat related subject by the Supreme Court of the United States, as pointed out in the article referred to. The development of equity jurisdiction in civil matters, however much it was ridiculed in earlier days, was not a capricious development. It became established on practical grounds of principle. It was developed by equity judges with a good deal of conflict and criticism from their common law brethren. In the development of the "equitable" principles in the administration of the criminal law, the judges are not in conflict with other courts administering a stricter system of law. They have the difficult task, developed by the legislatures as reflecting modern public opinion, of fitting a sound "equitable" practice, under the statutes, or in the exercise of their common law powers, into the stricter requirements of the criminal law in their own courts. The difficulty of the task is, of course, not generally realized by the public, which has to judge by results and general impressions and which, while habitually good-natured, expects the "deterrent principle" to be remembered by the courts, however, difficult it may be to combine it with humanitarian impulses.

It is always easy, and sometimes fair, to ridicule certain phases of the practical application of principles by the courts. In the earlier periods of the growth of equity jurisdiction it was common to ridicule it by saying that it varied with the length of the chancellor's foot. In the same way this or that variety of practice or occasional application of the probation principle may deserve ridicule and get it. It is not the intention in this article to minimize in any way the serious consequences which may result if the tempation to be excessively benevolent, or good-natured, or even to consider political circumstances, is yielded to.

That the system opens up serious problems which may vary in degree in different jurisdictions is vividly pointed out by Professor Kocourek in his short article in the "Journal of the American Institute of Criminal Law and Criminology" for May, 1915, entitled, "An Unconsidered Element in the Probation of First Offenders." He calls attention to the fact that in some jurisdictions under certain circumstances "the probation system tends to make a victim of the person injured in favor of the wrongdoer," that there is a tendency to ignore the person whose goods have been stolen, etc., and that the results of this tendency are only partially offset by the development of burglary insurance and other forms of insurance against criminal deprivation or destruction of property.

He says:

> "The probation principle may be seriously questioned, since it advertises to the world that a first offence brings no reproof from the State except some well-intentioned counsels from the trial judge and the possible inconvenience of restoring what has been illegally taken or destroyed, if it happens that a resentful victim of the crime is willing to sacrifice his time and his effort and sometimes considerable outlays of money for such a barren result" and after citing illustrations;
>
> "The deterrent effect of criminal punishment is largely eliminated in such cases as the above, and perhaps persons will be discovered who are actually stimulated by the promising situation which threatens nothing more serious than the restoration of the gains of a criminal enterprise. The great bulk of the members of any civilized society will remain unaffected by any such inducements, and for them a criminal code is entirely unnecessary except as a shield of defence. It seems hard to take away from this part of society this armor of protection, not for any delinquency

on their part, but in order to perform an experiment on their enemies. . . ."

He concludes, however, that "the probation principle as a visitorial expedient which leaves the offender in his normal surroundings as a productive unit of society under the direct tutelage of the State is a valuable invention provided that the probation system does not for the purpose of reforming the offender inflict an evil on the person injured, and does not by its leniency encourage the commission of crimes."

Just at present, there is a noticeable reaction in public opinion from one of extreme leniency toward a "stiffer" treatment. People who have small places in the country, which are closed during part of the year and who find them continually broken into and either looted or maliciously "messed up"; people who have flowers or shrubs on which they have spent much labor and care and find them torn up or broken; people whose cars are stolen or who suffer from a variety of other predatory offenses—such people, and there are many of them to-day, simply don't care what the statistics show or what the doctors, or the humanitarians think about the "crime waves" or the "cure" theory or "probation" or what-not; they think they know that there is a great deal more of this sort of thing going on than there used to be, than there ought to be and than there need be. While they believe in being humane, they think they know that too much humanitarian "cure" theory simply "takes the lid off" human nature and that the "deterrent principle" is the "preventive medicine" of the criminal law. They think they know that the deterrent principle of *consequences* runs through life whether it be as expressed in Hamlet's soliloquy, or the old-fashioned spanking in the woodshed, and that since America is the "home of the obedient parent" and old-fashioned parental methods are in abeyance, and since the religious restraints are weaker, some practical form of deterrence must be developed which will provide a reasonable background of support for the police.

Since the word "complex" arrived in common use in connection with the name of Freud, we are apt to use it to describe all kinds of enthusiasms and we have the "inferiority complex", the "efficiency complex", the "organization complex," etc., which might, perhaps, be otherwise classed as temporary attacks of "single-track mind." Perhaps there is also an "insanity" and

"mental or emotional disease complex." Dr. Folsom, whose book has been referred to, was once consulted by a young lady who told him all her nervous symptoms and, after listening to her, he wrote her a prescription. That evening he was called on the telephone by the clerk in a drug store who said the lady had sent the prescription to be filled and wanted to know where to get it. The prescription which Dr. Folsom had written was, "A little Common Sense three times a day." Perhaps there is a moral to the story.

But it is no easy thing for judges or any one else to find the "Common Sense" solution for every case in the criminal courts and their mistakes are apt to attract an undue amount of attention at times as compared with the large number of cases which they treat wisely. Part of the solution of the problem of applying the deterrent principle soundly lies with the legislature in experiments with criminal procedure to eliminate delays and appeals for delay. Prompt fairness is the ultimate object.

F. W. G.

THE COMMITTEE ON AMERICAN CITIZENSHIP OF THE AMERICAN BAR ASSOCIATION

On recommendation of the Executive Committee of the American Bar Association, at its last meeting, the Association's Constitution was so amended as to make the Committee on American Citizenship a permanent standing Committee.

This Committee, composed of Josiah Marvel, Chairman, Wilmington, Del., Elihu Root, N. Y. City, Cordenio A. Severance, St. Paul, Minn., F. Dumont Smith, Hutchinson, Kan., and Charles E. Matson, Lincoln, Nebraska, after conference with the Federal Judges, and officers of the State and other Bar Associations, appointed a sub-committee on Citizenship for each state. The Committee on Citizenship for the State of Massachusetts is as follows:— D. Chauncey Brewer, Chairman, Samuel C. Bennett, James Farrell, Vernon W. Marr, Abraham E. Pinanski, and Robert Walcott.

State Committees are expected to further the work of the National Committee by securing the co-operation of local Bar Associations in matters which have to do with—

the teaching of American history and the responsibilities of citizenship in the schools; and

the wise administration of naturalization laws.

While the Committee is asked to give attention to the matters thus referred to, and to be in a position to provide legally trained speakers for civic occasions, they are at liberty to shape the program in this section.

A BRIEF HISTORY OF THE SOCIAL LAW LIBRARY

The bar of the present day is so surfeited with books that the real meaning of the growth of a great library and the generous professional interest of individuals in building it up as a public service to the community is apt to be overlooked. At this time when the question of alterations in the Court House and possible erection of new buildings for use of the courts is under consideration, it seems an appropriate time to visualize the very real part in the development and maintenance of Massachusetts law played by the Social Law Library, which has been housed in the Court House in Boston, in its successive buildings since 1814. It is to-day one of the leading law libraries in the country. Its growth has kept pace with the growth of the law and with the multiplicity of problems of the courts. In this way it is a striking illustration of the "absolutely impersonal force" which is the cause of "the prominence of lawyers in a democracy." That force is the training needed to study, understand, and apply principles as law. Some form of examination as to the knowledge of how to make use of a law library might perhaps well be added to the present examinations for the bar.

The Social Law Library is sustained by dues from members and the income from some small bequests from former members. The present membership in the library is 1132.

The Proprietors held their first meeting on the 23rd of April, 1804. The request for the meeting was signed by Theophilus Parsons, Daniel Davis, John Phillips, William Sullivan, Charles Jackson, and Warren Dutton.

It is an interesting fact, as indicated by the name of the Social Law Library and the sociable character of its early proceedings as described in the records quoted by Mr. Stebbins in the following account, that the original organization had somewhat the character of a bar association in addition to the primary purpose of a library.

The original act of incorporation, which was passed by the legislature in 1814, provided, and still provides, as follows:

> "SEC. 5. *Be it further enacted,* That the Governor, Lieutenant-Governor, and the Members of the Council of this Commonwealth, at all times, and the Members of the

Senate, and House of Representatives, during any session of the General Court, shall have free access to, and the full and entire use and enjoyment of, the said Library, and all the privileges and advantages thereof, free of expense, under the same regulations as may be provided by the by-laws of the said Corporation, for the proprietors thereof; and the Judges of the Supreme Judicial Court, and of all the Judicial Courts of the County of Suffolk, and of the Courts of the United States, together with the Attorney-General, and Solicitor-General, and the Reporter of the Judicial Decisions of the Supreme Judicial Courts of this Commonwealth, and the Attorney of the United States for the District of Massachusetts, shall at all times, under the like regulations, have free access to, and the free use and enjoyment of, the said Library, free of any expense."

Sections six and seven have become inoperative, but the recognition of the importance of the library appears in them which has subsequently been translated into the continued provision for quarters in successive court houses together with a small annual appropriation.

"SEC. 6. *Be it further enacted,* That for the purpose of enabling said Corporation to enlarge, increase, improve, and manage said Library, and to effect the laudable objects contemplated by said Corporation, there be, and hereby are, granted and appropriated to said Corporation, all sums of money which may be hereafter paid, by way of tax or excise by all persons admitted to practise as Attorneys, in the Boston Court of Common Pleas, in the County of Suffolk; and the County Treasurer for the County of Suffolk is hereby authorized and directed to account with and pay over to the Treasurer of the said Corporation, or any other officer or officers, person or persons, duly authorized by said Corporation to receive the same, the moneys aforesaid, hereby granted and appropriated.

SEC. 7. But whereas doubts have arisen whether the tax or excise by law payable by attorneys, on admission to the Circuit Court of Common Pleas, be extended to the Boston Court of Common Pleas, *Be it therefore further enacted,* That every person admitted as an Attorney to the Boston Court of Common Pleas be required to pay to the Treasurer of the County of Suffolk, the same sum which is by law payable in other Counties, on admission to the Circuit Court of Common Pleas, and procure, and produce to the Court, said County Treasurer's receipt therefor."

F. W. G.

EXTRACTS FROM "HISTORY OF THE SOCIAL LAW LIBRARY, BOSTON", BY HOWARD L. STEBBINS, LIBRARIAN. "LAW LIBRARY JOURNAL" OCT., 1920

"'Why *Social* Law Library?' The name indicates the feeling with which the Library was formed. Early in 1804 a group of individuals, spoken of in the call for the first meeting as 'Proprietors of a social library,' organized for their mutual benefit. Festivities were mingled with the early proceedings of the society. For some years the members dined together on the occasion of the annual meeting. Of one of these repasts the minute book says: 'The Proprietors afterwards dined together at Concert Hall. Many respectable Characters beside Brethren of the Bar attending the Legislature were Guests. Many good songs and appropriate toasts heightened the pleasure of the entertainment.'

This pleasing custom passed into the discard before many years and the Proprietors settled down to their main business of maintaining and increasing the Library. . . .

Almost immediately on organization a portion of the court house was assigned to the Library. There is some confusion in the records as to whether this room was ever used. The statement most likely to be authentic says: 'The Library, being but small, was kept in the office of a member of the Bar, who acted as Librarian.' In a few years a new court house was built, and the books were established in quarters there in 1814. Ever since then the Library has been a tenant of the three court houses which at different periods have served the needs of Suffolk County. Unlike the other county law libraries of Massachusetts it remains a private subscription library. . . .

For the first half century of the Library's existence the librarian was little more than a custodian of the books; the active guidance of the Library's affairs fell upon committees of the trustees. Shortly after the Library was projected they 'Voted, that the books shall be numbered and arranged according to their size upon the shelves, which shall also be numbered.' The Librarian was to keep a list in alphabetical order with the location of the books indicated. Pronouncements by the trustees at various times direct the Clerk to procure some person to cover the books with paper, and to prepare printed labels to be pasted on the backs of the books. Was it necessary to rearrange the books, or take an inventory, this work fell on the trustees rather than the librarian, and formal inspections were frequently made by that body.

One of these inspections was set for July 3, 1815. Only one trustee appeared on the scene and after he had called it a day he reported that only two volumes were missing. In contrast to this is a careful report made by a committee in 1824 which appears in the minute book, with a list of duplicates, a list of missing volumes and comments. Our by-laws still require the trustees to examine the Library and cause search to be made for missing books, but this duty is now carried on by proxy.

On moving into the court house in 1814 the society took a new lease of life. An act of incorporation was passed by the Legislature, the Library was opened to annual subscribers as well as to Proprietors, and the trustees set to work in earnest to build up the collection of books. Lemuel Shaw, afterwards Chief Justice, was chairman of a committee to secure a librarian and to offer him $100 per year, 'at which price,' say the records, 'it is hoped a person of suitable qualifications can be obtained.' The Chief Justice was rather dubious on this point and favored a larger offer. It was also proposed to secure a law student as librarian and to give him one year's credit in his studies. It proved to be possible to obtain librarians from time to time at the $100 figure. This was not the librarian's net gain, however, as he was required to pay his assistant, should he desire one.

Lemuel Shaw remained a trustee until 1830, when he was appointed Chief Justice, and was very active in the affairs of the Library, usually heading the Committee to buy books. On his death in 1860 the Library received a legacy of $200 and in recent years his descendants have donated the bulk of his papers. These include 53 bound volumes of manuscript notes of cases heard before him and hundreds of unbound papers. His gold watch and other mementos are also in the custody of the Library. Other prominent members in the early days were Theophilus Parsons, and Pickering, Tyng and others whose names you will recognize from your use of the Massachusetts reports.

Many books have been acquired by gift throughout the Library's existence. In 1824 an edition of the Scottish acts was received from Sir John Hope, Solicitor-General of Scotland. The trustees thereupon purchased a set of Wheaton's reports, of which nine volumes were out, for presentation to Sir John. He responded with John Milton's works. Later on the trustees sent him the remaining volumes of Wheaton and then the exchange of gifts was allowed to lapse.

The Library performed its functions without special event up to Civil War days. Late in the twenties James Boyle had been secured as librarian and he held the post more than forty years. Printed catalogues were issued in 1824, 1849 and 1865. At the latter date, the Library numbered 8269 volumes. The 1865 edition is our latest printed catalogue. It is still in demand.

War and post-war inflation had swept the Librarian's salary up to $600 in 1867. Out of this sum, however, he was still required to pay his assistant. About this time the Librarian began to be a real power in the Library, and the book committee was authorized to call upon him for help in checking publishers' lists.

Two years later Mr. Boyle resigned. After a brief interval Francis Wales Vaughan was appointed librarian and remained until 1908. Thus Messrs. Boyle and Vaughan ministered to the users of the Library for upwards of 80 years. Mr. Vaughan was a member of the bar, and the first man to give his entire time to the

position. His initial salary was $600, but a capable assistant librarian was provided and his compensation was increased from time to time.

The 'new' or present court house in Pemberton Square was occupied in 1893. The Library was closed while being moved and installed in its quarters on the second floor. These quarters were occupied until 1910 when the court house was remodeled and enlarged. The Library then moved to the fourth floor where it now is.

Mr. Vaughan, who resigned in 1908, was succeeded by Charles F. D. Belden, who remained less than a year. He then became State Librarian, going from there to the Boston Public Library. He was followed by Edward B. Adams, who after four years became head of the Harvard Law School Library. His assistant, Edward H. Redstone, took the helm until the spring of 1919 when he was appointed State Librarian. Since then the present incumbent (Howard L. Stebbins) has been in charge. . . .

Mr. Adams found the catalogue to be his most urgent problem. I have said that our last printed catalogue appeared in 1865. . . . Mr. Adams set to work to build his card catalogue from the ground up. Work was pushed rapidly for several years and after a hiatus was resumed under Mr. Redstone. It was not until three years ago that the Library could be called fully catalogued. Even now we cannot say that every book is carded, but the catalogue does cover all parts of the collection except a little rarely used material here and there.

Hardly daring at first to buy anything but new books for fear he was getting duplicates, Mr. Adams was indefatigable in his efforts to build up the Library. He conducted a voluminous correspondence with booksellers and spared no effort in arranging the collection and searching out and filling in gaps. In the course of his work he discovered a 1472 Justinian on the open shelves and found numerous rare books scattered through the Library, some without any mark of ownership. . . .

We believe that we now have about 73,000 volumes and pamphlets. [This estimate was in 1920.]

Our collection covers the United States, Canada and the British Isles in very thorough fashion. In these jurisdictions there is lacking very little that an American lawyer needs, either in current or superseded material. Our book selection problems are comparatively simple for in this field we buy with discrimination all the useful material as it appears. Outside the countries named, we do very little. The State Library and the Harvard Law School have fine foreign collections and we do not believe in useless duplication.

Proprietors are allowed to withdraw for limited periods practically all books except the latest statutes, the briefs and a few reference works. Annual subscribers are not allowed to draw books, and have no voice in the management of the Library. The great bulk of the work is carried on in the Library room; the withdrawal of books is comparatively unimportant."

THE PRESIDENTS OF THE LIBRARY SINCE 1804

1804–1809 THEOPHILUS PARSONS
1809–1817 DUDLEY A. TYNG
1817–1833 WM. SULLIVAN
1833–1841 WM. MINOT
1841–1852 BENJAMIN RAND
1852–1867 SAMUEL E. SEWALL
1867–1871 GEORGE BEMIS
1871–1878 RICHARD H. DANA
1878–1896 WM. G. RUSSELL
1896–1906 CHARLES A. WELCH
1906– EDWARD W. HUTCHINS

For a number of years A. Lawrence Lowell, now President of Harvard College, acted as Clerk and Treasurer.

The present officers are as follows:

President EDWARD W. HUTCHINS
Clerk and Treasurer HENRY A. WYMAN

Trustees

SAMUEL C. BENNET
ROBERT G. DODGE
E. W. HUTCHINS
FRANK W. GRINNELL
JOHN E. HANNIGAN
JOHN G. PALFREY
J. SYDNEY STONE
ROBERT D. WESTON
HENRY A. WYMAN

REQUEST FROM A LAW LIBRARY FOR REPORTS OF THE ATTORNEY GENERAL OF MASSACHUSETTS

Editor Massachusetts Law Quarterly:

We lack in this library the following reports of the Attorney General of Massachusetts: 1841, 1853, 1854, 1857 to 1859, 1863, 1864, 1866, 1918.

Would it be possible through the columns of the MASSACHUSETTS LAW QUARTERLY to request any members of the Bar who have any of the above volumes, which they care to dispose of, to be so kind as to let us have them? We should like very much to complete our set. If you can give this request publicity, we shall be greatly obliged.

Yours very sincerely,

ELDON R. JAMES, *Librarian.*
HARVARD LAW SCHOOL,
Cambridge, Mass.

"THE LIMITS OF LEGAL TOLERATION" OF FREE SPEECH

(Extract from Note in the "Harvard Law Review," for January, 1920)

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The recent decision of the Supreme Court of the United States in the recent Gitlow case* sustaining the criminal anarchy statute in which Justices Holmes and Brandeis dissented, as they have dissented in some of the earlier free speech cases, recalls an exceptionally well written note which appeared in the "Harvard Law Review" of January, 1920, over the initials "D. K.," which we understand to mean "Day Kimball," then one of the student editors of the *Review*, who disagreed with the views of one of the professors and stated his reasons in this note.

The note grew out of the discussion which followed the trial of the Abrams case and the power of Congress under the first amendment. Whether we agree with the conclusions or not, the general discussion of the constitutional aspects of legislative power in this connection is so well done that it seems likely to interest the bar and also to be suggestive in connection with the problem dealt with in the decision in the Gitlow case, which involved the discussion of state action under the fourteenth amendment instead of that of Congress under the first amendment. Accordingly, the following extract is here reprinted by permission.

"THE LIMITS OF LEGAL TOLERATION"

An article in a recent number of this *Review* deals at length with the relation of the constitutional guaranty of free speech to such war legislation.[23] It is there suggested that the social theory embodied in, and imposed upon us by, the First Amendment [24] may be crystallized into a rule of law. Subject to the existing law of Defamation and Fraud, freedom in the expression of opposition to the aims, laws, or structure of our government may be abridged only when such utterances would, by the rules of the common law, constitute attempts or incitements to commit substantive crimes against the government. Like the Constitution itself, the rule

* The decision was rendered in June, but as this May number of the magazine is late in appearing, this note is included while the subject is still fresh.

[23] Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932.

[24] "Congress shall make no law . . . abridging the freedom of speech or of the press," U. S. CONSTITUTION, AMENDMENT I.

should persist in time of war, as in peace. This conclusion is based upon an historical investigation which demonstrates that the amendment was aimed not merely, as conceived by the Blackstonian definition, at prior governmental censorship, but also at such subsequent censorship by prosecutions for seditious libel as was then practiced in England. The amendment is found to be the expression of a broad principle of political faith: that unfettered expression of ideas, because essential to the slow progress toward ultimate truth, is a social interest to be zealously protected from abridgment. And this political tenet, though based on the need to question all things, shall, the amendment ordains, itself remain unquestioned.

If we grant the inadequacy of the Blackstonian doctrine,[25] if we admit and admire the clear exposition of the social theory which underlies the First Amendment, must we therefore subscribe to the rule of constitutional law deduced therefrom?

At the outset it should be noted that the rule presupposed that a "clear and present danger to success" is invariably the measure of that "dangerous proximity to success" necessary to constitute an attempt.[26] This seems questionable.[27] The degree of proximity required varies from offense to offense, and depends upon the gravity of the crime attempted and the special facts of each case.[28] The phrase "dangerous proximity to success" has only acquired meaning in the case of specific offenses by a process of exclusion and inclusion; as the result of a series of cases dealing with attempts to commit a particular crime.[29] The want of such blocking out by judicial decision is precisely the troublesome factor in the case of those crimes to which the rule is sought to be applied.[30]

But whether a clear and present danger of success be a necessary ingredient of all attempts or not, to maintain that the rule marks a sharp line which Congress may not transgress, may not even transgress by virtue of the war power, is, it is believed, untenable.[31] The First Amendment is an expression of political faith;

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[25] See Roscoe Pound, "Equitable Relief against Defamation and Injuries to Personality," 29 HARV. L. REV. 651; COOLEY, CONSTITUTIONAL LIMITATIONS 7 ed. 596 *et seq.*

[26] Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932 967.

[27] In Masses Pub. Co. *v.* Patten, 246 Fed. 24 (C. C. A. 2d C., 1917), the judges of the Circuit Court of Appeals appear to have taken this view. In the case of a conviction under the original Act, and hence necessarily for an "attempt," they substitute "natural and reasonable effect" as a measure of the degree of dangerous proximity to success required.

[28] See Holmes, J., in Commonwealth *v.* Kennedy, 170 Mass. 18, 20, 48 N. E. 770.

[29] See J. H. Beale, Jr., "Criminal Attempts," 16 HARV. L. REV. 491, 501.

[30] This point is commented on at length by the learned author. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, 942 *et seq.*

[31] This the learned author at one point in his argument seems himself to admit. See Zechariah Chafee, Jr., "Freedom of Speech in War Time," 32 HARV. L. REV. 932, at 963. If the test proposed punishes agitation at its "boiling point"—yet Congress may go further back and punish at a point which is "hot" though not at one which is "merely warm"—then the test is not one of constitutionality at all. We are faced, unaided, by a question of heat; and the true constitutional rule is yet to be ascertained.

not a prohibition which can be defined by mere interpretation of the language employed. The policy to which it commits us is one of toleration; of recognition of the "relativity of values." But legal toleration pushed to its ultimate conclusion becomes impotence, self-destruction. We may not believe that the truths we hold are immutable, but for some of them at least we must stand ready to fight. Somewhere we must be willing to put our back against the wall of opinion, or existence becomes impossible. The law must resist its own destruction. Thus, though we may readily conceive that the overthrow of our government by force might well produce a bettered social order, yet the law must punish such action, must thwart the appreciated possibility of the attainment of new and better truth. So too, logically, must it condemn all acts or utterances aimed at such subversion, or tending solely thither. It must do so, not because sure of the eternal rightness of its own doctrines, but because the law must believe that law is better than no law, that its own preservation is better than its own destruction. Now it is true the First Amendment is a binding adjudication that freedom of speech is a thing of great social value.[32] But the why and the wherefor thereof must be considered. Freedom of speech is of social value, apart from its gratification of the individual's desire to have his say, because it permits thought to get itself accepted at the bar of public opinion; and, by becoming actuality, to benefit society. This reason ceases to exist when that actuality would be of the sort which we have seen the law must prohibit, irrespective of ultimate merits.

It is conceived, therefore, that the guaranty of the First Amendment extends only so far as the reason behind the guaranty demands; and that it does not inhibit the suppression, whenever reasonably necessary, of utterances whose aims render them a menace to the existence of the state. In the case of such utterances it is for Congress to judge, in the light of existing conditions, whether of war or peace, as to the kind and amount of repression necessary.[33] Unless palpably unreasonable, the decision of Congress should be respected by the courts.[34] If we are to deal in realities, it is believed no more specific definition is possible. To limit the state's right of self-protection to the punishing of attempts and

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[32] But *that* social interest may be outweighed by others; activities necessary to the preservation of morals or the safety of the state, for instance. See Roscoe Pound, "Interests of Personality," 28 HARV. L. REV. 445, 456. Compare the Civil War "free speech" case, *Ex parte* Vallandigham, 1 Wall. (U. S.) 243 (1863) and *idem*, 28 Fed. Cas. 874 (1863).

[33] Compare the now settled right of Congress to decide that conscription is a necessary method of raising an army, despite the provisions of the Thirteenth Amendment. Arver *v.* United States (Selective Draft Law Cases), 245 U. S. 366 (1917). *Cf. Ex parte* Vallandigham, *supra*, note 32. See Martin *v.* Mott, 12 Wheat. 19 (1827); McCulloch *v.* Maryland, 4 Wheat. 316 (1819). See also Ambrose Tighe, "The Theory of the Minnesota 'Safety Commission' Act," 3 MINN. L. REV. 1; and C. H. Hough, "Law in War Time — 1917," 31 HARV. L. REV. 692.

[34] See THAYER, LEGAL ESSAYS, 1-41.

incitements is purely arbitrary.[35] There is nothing in the policy imposed by the amendment, as construed in the light of the reason underlying that policy, to indicate such an intention.

How far behind the point of actual success it is wise or effective to go in punishing utterances that are beyond the pale of constitutional protection is a question worthy of deep consideration.[36] But within the field of its discretion Congress is sole judge of the political expediency of its own acts. Those who have often condemned judicial refusal to give effect to so-called "liberal" legislation, because the refusal seemed to them based upon individual opinions of desirability, should not reverse their position now that the shoe pinches on the other foot.

It may be objected that the line of reasoning suggested reduces the First Amendment to a nullity. This is untrue. The reason behind the safeguard excludes from its protection only those utterances whose aim or obvious tendency is toward methods of change which the law cannot sanction: only those utterances, that is, whose aim is to subvert the government and the law, either directly, as by revolt; or indirectly, as by assistance to a foreign enemy in time of war. But there remains within the protection of the guaranty unfettered advocacy of any change, provided only it be by lawful means. The most humiliating censure of the administration; bitter and intemperate criticism of a public official to prevent reëlection or procure impeachment; attacks upon the form of government itself to induce amendment—as to these the hands of Congress are tied. No conviction that the ultimate objects were fraught with disaster would permit Congressional interference. Yet the English law of Seditious Libel could have found therein food for prosecutions. The line may be indefinite,—all lines are hard to draw,—it is none the less real.[37] It differentiates between utterances, in the language of Best, J., according as they would result in "setting the government in motion for the people or setting the people

[35] It is submitted that the power of Congress to legislate at all upon such matters, *i. e.* apart from the question of express constitutional prohibition, rests upon the right of self-protection. The Constitution recognizes this right by according, in normal times, the power "to make all laws necessary and proper . . . " etc.; by according, in abnormal times, the "war powers." See H. W. Bikle, "The jurisdiction of the United States over Seditious Libel," 41 Am. L. Reg. (n. s.) 1.

[36] Bad teachings cannot be overcome by force. Neither is repression a cure for grievances. Yet war is a jealous mistress; and the catchword, "during the present emergency," was then no empty phrase; while even to-day one must be blind not to perceive the danger to civilization itself from what Mr. Gilbert Murray has called "the monstrous and debauching power of the organized lie." See an admirable article on this point in Vol. I, No. 30, The Review, p. 634 (December 6, 1919).

[37] The unwillingness of courts to question the constitutionality of the Act is perhaps an indication of tacit acquiescence in the view suggested, since under that view the clauses of the Act which have so far come up for consideration seem clearly constitutional. Note the remarks of Justice Holmes in the Schenck case: "When a nation is at war many things that might be said in time of peace are such a hindrance to its efforts that their utterance will not be endured so long as men fight and that no court could regard them as protected by any constitutional right." Schenck *v.* United States, 249 U. S. 47, 39 Sup. Ct. Rep. 247, 249 (1919). See also the remarks of Hand J., quoted *supra*, note 2; and his assumption of the constitutionality of the Amended Act in United States *v.* Curran, *supra*, note 11.

in motion against the government."[38] And it must not be forgotten that, in the case of the latter, the power, not the wisdom, of repression is alone under discussion.

Finally there remain in addition those guaranties which have now sufficed to insure the free exchange of ideas in England for over a half-century. Whatever new test of criminality Congress may enact, the final application of that test rests in the hands of the jury. There it may safely be left. Of whatever lapses our "twelve good men and true" may have been guilty on specific occasions, they are too typical a feature of our legal system, are too ingrained in its very structure, to be condemned without mature reflection. They are drawn from the people. Their opinion may be considered representative of public opinion in general. And that public opinion in this matter should rule is in full accord with the spirit of our government. For it must be remembered that the First Amendment means what it was intended to mean at its inception, not what some of us might think it wise that it should mean to-day. And does not history show us that its primary object was to protect the people against the government, the master against his servant, rather than to protect a few of the people against the force of public opinion, the master against his fellow masters?[39]

There are those to whom all of the foregoing will seem but safeguards of straw; who will feel that to admit that Congress in this matter can be completely circumscribed by no clearly drawn line is to sacrifice all. For them there is perhaps some bitter consolation to be had from the opinion of a famous champion of free speech, Alexander Hamilton: "What is the liberty of the Press? Who can give it any definition that would not leave the utmost latitude for evasion? I hold it to be impracticable; and from this I infer, that its security, whatever fine declarations may be inserted in any constitution respecting it, must altogether depend on public opinion, and on the general spirit of the people and the government."[40]

D. K.

[38] See Rex *v.* Burdett, 4 B. & Ald. 95, 132 (1820).
[39] J. R. Long, "The Freedom of the Press," 5 Va. L. Rev. 225.
[40] Hamilton, The Federalist, 631, 632. See 16 Harv. L. Rev. 55.

A CONSTITUTIONAL MONUMENT TO FRANK F. DRESSER.

The bar of Massachusetts as a whole, as well as the Massachusetts Bar Association, lost one of its ablest and most helpful members, and the Commonwealth lost one of its most public-spirited citizens in the best sense, by the recent death of Frank F. Dresser of Worcester at the early age of 51. He was a man who thought effectively. He showed a sustained professional interest and in his thinking, kept his eye on the details of life, in which, as has been said, "lie all the truth and reality." This faculty of think-

ing about details, as well as outlines, showed itself in the constitutional convention, of which he was an important member.

We wish now to call attention merely to one story, little known, and the full significance of which is not likely to be gathered from the printed records of the convention unless attention is called to it. The *Journal of the Convention*, pp. 326–332, shows the following formal entries.

The convention having assembled at 2 P. M. on Oct. 11, 1917, it was voted, "That if the convention is in session at 4 o'clock P. M. today, the president declare an adjournment until 4.15 o'clock and that the subsequent session be considered a legislative day." The resolution "To authorize the enactment of laws governing the acquirement, sale and distribution of the necessities of life," which had been ordered to a third reading on Oct. 3, was then considered further. Various amendments were debated and rejected. The resolution was then passed to be engrossed in the following form (Con. Doc. No. 363):

"ARTICLE OF AMENDMENT.

> The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and it shall be the duty of the Commonwealth and of the cities and towns therein to take and to provide the same for their inhabitants in such manner as the general court shall determine."

"At 27 minutes after 4 o'clock, the president declared the convention adjourned to meet again at once as provided in a foregoing motion."

The second "legislative day" of Oct. 11 then began. It was moved that the vote of the previous session be reconsidered by which the resolution numbered 363 was passed to be engrossed. This motion was negatived.

"RECESS.

> At twelve minutes before five o'clock . . . . a recess was taken until half-past five o'clock; at which hour the convention reassembled.

ENGROSSED RESOLUTION.

> The engrossed Resolution to authorize the enactment of laws governing the acquirement, sale and distribution of the necessaries of life (see Doc. No. 363) was laid before the Convention, the question being on submitting the same to the people.

Mr. Dresser of Worcester moved that Rule 53 be suspended, that the resolution might be amended; and this motion prevailed.

The same member moved that the resolution be amended as follows:—

By striking out, in line 7 (as printed), the words 'it shall be the duty of';

By striking out, in line 8, the word 'of'; and

By striking out, in the same line, the word 'to,' in both places where it occurs, and inserting in place thereof, in each instance, the word 'may.'

After debate the amendments were adopted, by a vote of 104 to 28.

After further debate the Convention voted to submit the resolution, as amended, to the people."

(*Journal of the Convention*, 1917, pp. 331–2).

What does this dry, formal record mean? It means that between 4.48 P. M. and about 5.45 P. M. on Oct. 11, 1917, Frank F. Dresser probably saved an indefinite number of cities and towns in Massachusetts from serious danger of approaching bankruptcy in the future, with its incidental burdens of taxation and general unsettlement. The reason for the adjournment at the end of the afternoon to meet again the same afternoon was that the convention wished this amendment to go on the state ballot at the election in November, 1917. In order that this should happen, it was necessary that the resolution should be "engrossed" and "submitted to the people" that same afternoon so that the Secretary of the Commonwealth could get it printed on the ballot.

The recess from 4.48 P. M. to 5.30 P. M. was to give the Secretary time to have the resolution engrossed. It was late in the afternoon and the time for possible amendments was past because a two-thirds vote was needed to suspend Rule 53. Members were tired and wanted to go home. It was a formidable legislative situation to face for a man who believed an amendment was needed. He had to convince enough men, during the recess and after he got on his feet at reassembling, to agree to suspend the rule and listen to his amendment. As soon as they reassembled, *Debates* Vol. I, pp. 847–8, shows the following entry:

"*Mr. Dresser of Worcester:* There is one phase in the engrossed resolution which, before it goes from this Convention, ought to be changed. I understand that an amendment is not in order, but by consent I should like to suggest this which I think I am right in stating has the approval of the chairman of the Form and Phraseology Committee:

To strike out, in line 7, the words 'it shall be the duty of'; to strike out, in line 8, the words 'of' and 'to' and 'to', and insert in line 8, before the word 'take,' the word 'may,' and before the word 'provide,' the word 'may,' so that it shall read: 'and the Commonwealth and the cities and towns therein may take and may provide the same for their inhabitants,' etc.

The point is simply this: When this resolution is adopted, as it is now written we are in fact in 'a time of war' and by this resolution we impose an imperative duty upon the Commonwealth and upon every city and town therein to take and to provide these supplies. That duty, when the Legislature meets may not be wise to perform or may be, and therefore there ought not to be the imperative duty, but there ought to be granted the full power which is expressed in 'may take' and 'may provide.' In my opinion the resolution is not changed in substance in the slightest by this amendment, but is more exactly and more properly expressed. I trust the amendment may be adopted."

The resolution thus amended was then "submitted to the people" to go on the ballot and was ratified in the following form:

"Art. XLVII. The maintenance and distribution at reasonable rates, during time of war, public exigency, emergency or distress, of a sufficient supply of food and other common necessaries of life and the providing of shelter, are public functions, and the commonwealth and the cities and towns therein may take and may provide the same for their inhabitants in such manner as the general court shall determine."

That the change from the mandatory, to the permissive, form of words did not alter the substantial meaning of the convention is true, but if the *apparently* mandatory words had been left in, no one can say how much oratory and misunderstanding in future might have pushed the legislature into authorizing various city and town authorities to "go into business" with the taxpayers' money on the plea that the constitution ordered them to do so in "time of war, public exigency, emergency or distress" whatever those words may mean. For Mr. Dresser's view as to their meaning see "Massachusetts Law Quarterly" for February, 1918, 85-86.

While this story may seem dry and somewhat involved, it forms in fact an important little chapter in the history of Massachusetts which will remain as a monument to the effective thinking of Frank Dresser.

F. W. G.

A FORGOTTEN ADMIRALTY JUDGE— SIR JULIUS CAESAR.

(From the Solicitors' Journal, April 18, 1925).

"Sir Julius Caesar was Deputy-Admiral, that is to say, Judge of the High Court of Admiralty between the years 1584 and 1605. He was in his own age a very famous judge, next to Sir Edward Coke and Lord Bacon, the most celebrated occupant of the bench during one whole generation. He is duly chronicled, we believe, amongst the two hundred and forty 'Illustrious Personages of Great Britain,' whose names figure in the eight volumes of portrait-biographies which Edmund Lodge, of the College of Heralds, published in 1850, but to the present generation he is no more than a name, if indeed he is even a name, outside the precincts of the Admiralty Court. Such is the unsubstantiality of even high judicial reputations when the hero had not the good fortune to find his way to the Woolsack or the Chief Justiceship.

"Yet to Sir Julius Caesar a mighty task fell. For he was Admiralty Judge in the Age of the Armada, and during the subsequent conflicts, regular or irregular, between English, Dutch and Spanish seamen all around the Spanish Main. He had to sit in prize cases, although his court was not then technically a Prize Court, and he had to hammer out those principles of Prize Law which a century later became generally recognized and accepted. He did this work most admirably. Indeed he did it so admirably that the Admiralty Court outran all rivals for jurisdiction in Prize Cases, and survived in the next generation the war of Prohibition, which Sir Edward Coke commenced against it as against all other of the judiciaries which trespassed, as he deemed it, on the jurisdiction of the Common Law Courts. When Sir Julius entered on office in 1584, prize cases were heard in at least six different courts: the King's Bench, Common Pleas, Exchequer, the Chancellor's Court, the King's Council, and the Deputy-Admiral's court. When he retired in 1605 no attempt was made by any of those rival authorities to usurp or interfere with the Court of Admiralty presided over by the Deputy-Admiral.

"The origins of the Prize Court and of the prize jurisdiction, are one of the most fascinating and instructive pages in the history of English Law. It arose in the most roundabout and unexpected of ways. For what happened was just this: In mediaeval times England had no regular navy. When war was on a few vessels were purchased and commissioned as King's ships — the Navy proper; others were requisitioned and similarly commissioned; others again simply received letters of 'Marque' or warrants to act as privateersmen against the King's enemies on the high seas. Usually the commission or warrant, as the case might be, granted

authority to the master to seize enemy ships, or enemy goods or neutral ships, and the grant to him of the ship or goods so seized.

"But when officers holding commissions or merchant-masters holding a privateer's warrant proceeded to capture ships and goods in pursuance of this authority, they frequently were too zealous in discharge of their duties, and they very often made serious mistakes. In such cases proceedings of various sorts were instituted against them by aggrieved subject or neutrals whose property had been taken. Sometimes the aggrieved parties proceeded in the Common Law Courts, but gradually these courts declined jurisdiction where the goods or the ship were not within English territory; they retained jurisdiction, however, wherever the ship had been seized if it was at the time of the event within the jurisdiction of an English court; it was not until the Restoration that jurisdiction in such cases definitely passed out of their hands. When he failed to get a writ in the King's Bench or one of the Common Law courts, the victim frequently petitioned the Chancellor, but gradually the Chancery also showed reluctance to assume jurisdiction, except when a case of fraud or trust appeared, or when the property belonged to a ward of court or was in the hands of a trustee. Balked in Chancery, the petitioner would present a petition to the King's Council, and at one time the Judicial Committee, if we may coin an anachronism, which was almost identical with the Star Chamber, would entertain claims of this kind.

"The final remedy if all other courts refused to hear a petition, was to send it to the Lord High Admiral, who delegated it to his Deputy-Admiral. Originally a kind of Judge-Admiral-General the Deputy-Admiral soon was selected from amongst lawyers skilled in the Civil and Common Law, because the Maritime Law was recognized to be a branch of Roman Law — or at any rate not a branch of Common Law. In due course the deputy became a judge, pure and simple, sitting in the Court of Admiralty to hear (1) normal collision, wreck, and salvage cases, whether in times of peace or war, and (2) prize claims in time of war. Before him practiced members of the College of Advocates, that is, doctors of civil and canon law, Doctors *Utriusque Juris*, admitted to their degrees by the Universities of Oxford and Cambridge.

"For a long time the divided jurisdiction between Common Law Courts, King's Council, Chancellor and Court of Admiralty continued in full swing. But gradually it was recognized that the peculiarities of Admiralty cases rendered them unsuitable subjects for judges not familiar with the special rules of the game. Claimants ceased to bring proceedings elsewhere, so much did they prefer the jurisdiction of the Deputy-Admiral. Moreover, Admirals, when they found captured ships at sea in possession of the captors, used to insist on the masters taking their prize into port and asking for inquiry into their character. If the masters refused they were liable to lose their commissions or warrants; in that case they ran

the risk of being treated as pirates. At first naval officers acted as Commissioners or Courts of Enquiry on the hearing and condemning of those prizes; but gradually this work was handed over to the Deputy-Admiral, and therefore to the Court of Admiralty. Finally every captor was required to bring his prize into the court and apply for a decree of condemnation within a proper time. Otherwise he was deprived of his commission.

"The jurisdiction which the Court exercised was very peculiar. At first it was merely an enquiry into the facts, and into the terms of the Royal Grant, to see whether or not the seizure of the prize was *intra vires* or *ultra vires* of the grant. Then the grant took a common form, embodied in every commission or warrant, and any departure from this common form invalidated the commission altogether. Then came a further step; it was presumed that the King's grant was made subject to any treaties into which he had entered with foreign countries; hence these treaties had to be interpreted and enforced. Lastly, the further presumption was made that every grant contained an implication of compliance with all the rules of Maritime Law as understood in the Comity of Nations. Hence the Rule of the Civil Law became the accepted law enforced in the court.

"Sir Julius Caesar did so great a work in upholding the authority of his court between 1584 and 1605 that his name was celebrated from John o' Groats to Land's End.

HISTORICUS."

Note.

The foregoing account is especially interesting as it gives a very different picture from that in Foss' "Judges of England" in which Sir Julius Caesar is pictured as a good deal of an office seeker but not much of a judge and practically nothing is said of his work in Admiralty. He appears to have retired from the Admiralty Court in 1605 and was later appointed master of the Rolls by James I. F. W. G.

JUDGE HOUGH'S "REPORTS OF ADMIRALTY CASES IN NEW YORK, 1715-1788."

In our February number we reprinted Hon. Nathan Matthews' reasoned appeal for public or private funds to preserve and make accessible in print the early County Court records in Massachusetts. We have recently received from the Yale University Press a volume of this character published in April of this year entitled:

SIR JULIUS CÆSAR, Kn.t

Master of the Rolls, &c.

Born at Tottenham in Middlesex, 1557;

Died April 18.th 1636.

Buried at S.t Helen's, Bishopsgate Streete.

Published Oct.r [illegible] by Rob.t Wilkinson, N.o 58 Cornhill, London.

LEWIS MORRIS
1671–1746
Chief Justice of the Province of New York and Governor of New Jersey
Acting Judge in Admiralty From 1715–1721

(Reproduced by permission of the Yale University Press)

"Reports of Cases in the Vice Admiralty of the Province of New York and in the Court of Admiralty of the State of New York, 1715-1788, with an Historical Introduction and Appendix. Edited by Charles Merrill Hough, LL. D., United States Circuit Judge." It was made possible by Judge Hough and members of the New York bar.

Besides the historical preface the book contains portraits of the Admiralty judges during the period including that of Lewis Morris, Chief Justice of the Province of New York, whose refusal to obey the wishes of Governor Cosby caused his removal, and whose attacks on the interference with the judiciary resulted in the trial of his publisher Zenger for libel in the celebrated case in 173?, in which Andrew Hamilton of Philadelphia appeared for the defense at the age of eighty and secured an acquittal. This case is referred to in the November number of this magazine (p. 209) as the first great public stand in America in favor of an independent bench which had a profound influence throughout the colonies. Because of his part in that historic drama we reproduce his portrait here.

Of Chief Justice Morris, it is said:

> "though he was indolent in the management of his private affairs, yet through the love of power he was always busy in matters of political nature, and no man in the Colony equalled him in the knowledge of the law and the arts of intrigue.' He has left no considered judicial opinions, except his dissent as Chief Justice in *Cosby* vs. *Van Dam;* but Chalmers (p. 249) preserves an opinion of his, rendered *circa* 1720, on the question whether a change of Governor worked a dissolution of the Provincial Assembly, as a demise of the Crown dissolved Parliament, and it is a lawyer-like piece of work; while his pamphleteering in respect of the historic Van Dam and Zenger matters goes far to prove the acuteness of Smith's estimate of his character in respect of political activities.'
>
> *(Note:* See "Great American Lawyers," I, article "Andrew Hamilton," for some account of Morris and others who practiced much in Admiralty.)"

Judge Hough, in his introduction, says:

> "The contents of this volume are drawn from records which have lain upon the files of the United States District Court in New York City since its organization in 1789. Such

is the tradition of the Court, and seventy years ago Judge Betts wrote that in the preparation of his book on practice he had consulted 'the archives of the Admiralty of this District for more than seventy years and up to the Revolution.' The tradition is fortified by the arrangement and labelling of the papers themselves and is consonant with known occurrences in other jurisdictions, for all that search has hitherto revealed of Vice Admiralty remnants rests on the files of some court.

"So far as I have discovered, it is in New York alone that any documents exist other than minutes; nor was it the habit in other jurisdictions to enter therein at length what are nowadays called Opinions. The 'Sentence and decree' of the New York Judges was, however, so frequently more than a formal statement of result, that in many causes where the minutes alone survive, the facts litigated are plainly stated or easily inferable.

"The records in New York consist of minute books of the Vice Admiralty from 1715 to 1774, process, pleadings, motion papers, evidence and exhibits, almost none of which ante-date 1757; and papers of a similar nature from the Court of Admiralty of the State of New York covering 1784-1788, but no minute book, a volume for which prolonged search in many quarters has been fruitless. The minutes are incomplete, there being an unexplained hiatus extending from 1716 to 1723, and another of a year beginning in July, 1757; the last undoubtedly due to the loss of one original volume, and greatly to be regretted, as the Court was then at the height of its prize business. After 1762 the 'rough minutes' only remain, containing at times such entries as 'The Judge delivered his sentence, *prout* same on file,' —when unfortunately that particular file has disappeared. In November, 1774, the last page of a 'rough minute' book was filled. Undoubtedly another was opened but its fate is unknown. Only a few pages could have been used before the Court adjourned for the last time. The latest pleading is a libel of February, 1775, and the last known official act of the Vice Admiralty Judge was to tax a bill of costs on March 29, 1775.

"The State Admiralty papers evidence a business of about an hundred cases, fully one-half of them Customs seizures, and rarely contested. The brevity of this list is quite equalled by the quantity and kind of business in the earlier and latest years of the Vice Admiralty, which by modern standards was only fairly busy in time of war, when during six months beginning July, 1758, fifty cases in Prize and eight other matters were begun, or tried, or both. This was high tide, and before 1745 and after 1764 it was

rarely necessary to hold Court for the transaction of admiralty business more than once a month, and twenty-five causes a year is a fair estimate of average business.

"The preparation of these reports is a development from the wish to preserve from further decay the oldest papers possessed by the Courts with which I have been long concerned either as proctor or Judge. They had rested in dusty and oftentimes overheated rooms, for the most part creased and in bundles, labelled in the handwriting of Isaac Van Vleck, Deputy Register of the State Court of Admiralty, until in many cases handling had become impossible without risk of destruction. By the generosity of some score of the bar of the Court, the minute books and many of the file papers have been repaired and made readable; and having read them all, they appear to me of some importance, and more interest.

"Lord Stowell's objection to the reporting of Admiralty causes, his 'fear lest the report should exhibit the nakedness of the land,' has long been without foundation; and now that maritime litigations vie in number with those arising in many other departments of jurisprudence, it seems worth while to preserve in more available form than the originals can ever be, the acts and opinions of men who, in a day of small things, were (as I have come to believe) laying the foundations of most procedure and much substance of American Admiralty.

"The practice and procedure are easily understood by supplementing the minutes with the file papers; this done, the Court entries antedating surviving documents, prepared by counsel, become far more intelligible. Until this labor was undertaken, I never comprehended how large a fraction of any Court work is the bar's share thereof.*

"When the records begin it is plain that neither bar nor bench was doing more than using with commendable freedom what they knew of general law, wholly untrammelled by any traditions of Admiralty as pursued in England. I am convinced that they were completely ignorant of the habits of the High Court. . . .

"So far as the substantive law of the Court is concerned the professional reader must judge for himself from the decisions; to me it seems that this collection substantiates the celebrated remark of Justice Story that 'in point of fact the Vice Admiralty Court of Massachusetts before the Revolution exercised a jurisdiction far more extensive than that of the Admiralty in England,' for there could

* This sentence is particularly interesting in connection with the frequently exaggerated talk about "Judicial Legislation" or "Lawmaking," of MASS. LAW QUART. for May, 1923, p. 29.

> have been little difference between the daily work of the Boston and New York Courts, though Boston probably had then the heavier calendars. By 'extensive' was meant diversified, and when comparison is made between what the following pages show as having been done in New York and what Marsden exhibits as the habitual business of the High Court in the eighteenth century, Story's dictum receives firmer support than the tradition he repeated."

It is to be hoped that the admiralty bar of Massachusetts will take an interest in a similar rescue of the early admiralty records here. There must be many interesting cases waiting to be collected. A few of these cases, between 1773 and 1783 reported by Theophilus Parsons, appear in the notebook of Senator William Plumer, of New Hampshire, which was referred to in our February number for 1924 (p. 6). This book was recently located in the New Hampshire Historical Society and a photostat copy of it is now in the Massachusetts State Library, and I think also in the Harvard Law School Library.

F. W. G.

MEMORIALS OF JUSTICES OF THE SUPREME JUDICIAL COURT IN MASSACHUSETTS.

Compiled by Dr. G. E. Wire, Librarian Worcester County Law Library, Worcester, Mass.

These tables first appeared as a supplement to my annual report, 1913, and have recently been brought down to date.

I have indexed all the memorials of this state as they appear in the reports.

Considerable interesting matter, such as court rules, rules for admission to the bar, was also indexed and is on file in manuscript. We shall be glad to send it to any one especially interested in the legal history of this state.

The few abbreviations used are as follows:

app.—Appointed
d.—Died
Mem.—Memorial
reapp.—Reappointed
res.—Resigned.

Allen, C.	app. 132:190, res. 172:16
Allen, W.	app. 131:345, Mem. 154:76, 607-616
Ames, S.	app. 101:36, res. 130:242, Mem. 130:599-603
Barker, J. M.	app. 154:85, Mem. 189:213, 605-610

Putnam, S.	app. 11:*256, res. 44:453
Rugg, A. P.	app. 192:559, app. Ch. J. 210:32
Sanderson, G. A.	
Sedgwick, T.	Mem. 9:*215-216
Sewall, S.	Mem. 11:*256, 555-559
Shaw, L.	app. Ch. J. 26:520, res. 81:479, 599-608. Mem. 83:597-606
Sheldon, H. N.	app. 189:259, res. 220:83
Soule, A. L.	app. 122:421, res. 131:216, Mem. 145:593-603
Thacher, G.	res. 19:80
Thomas, B. F.	app. 65:1, res. 79:1, Mem. 125:597-601
Wait, W. C.	
Wells, J.	app. 95:1, Mem. 119:167, 605-612
Wilde, S. S.	app. 12:*348, res. 60:472, 583-589

AN UNFORTUNATE FEDERAL ECONOMY—THE LACK OF LAW BOOKS FOR THE USE OF FEDERAL JUDGES

(From the Springfield Republican, May 16, 1925)

The following communication from a Washington correspondent of the *Springfield Republican* deserves the attention of the bar and the public throughout the country.

Judges Lack Books as Fund Inadequate

CONGRESSIONAL ECONOMY HINDERS LEGAL BRANCH IN STUDYING LAWS

Washington, May 15—Starving the United States courts of books that the judges need is one of the practices of the government. Congress, although made up to no mean degree of lawyers, finds it hard to make an appropriation for libraries for the judges. It will provide them a salary and rooms to have their session in them, but as for the tools they so much need, law books, as little as possible for them. Of course, this does not apply to the United States Supreme Court which has an ample library, the product of years of collection. Moreover, both branches of Congress have large law libraries.

The judges have constantly protested against being so poorly provided for and through the department of justice have again and again asked for liberal treatment on this score from Congress. At the judicial conference of senior circuit judges a resolution was passed asking legislation which should provide $2500 to each clerk of the circuit courts to enable him to repair old books and to provide new ones. They asked for an appropriation of $5000 for the St. Paul and St. Louis courts, $8000 for the court of the eighth district, which sits at Kansas City, and $15,000 for New York. And there was to be a regular appropriation thereafter.

When Justice Stone, then attorney general, went to Congress for an appropriation for the books he said:—

"Personally I happen to know a good deal about the situation

in New York city. For many years there was located in the post-office building there a private law library known as the Law Institute. Because of lack of room in the building they were compelled to move out, and at some distance, and the judges lost their ready access to this library. It was a fine library and the courts have been left absolutely without library facilities.

"The general situation with respect to law books is that in many sections of the country judges and Unted States attorneys are required to prepare and decide their cases without resort even to the reports of the Supreme Court and the Federal Reporter. That situation has been allowed to run along year after year and allowed to grow worse and it is one of the most uneconomical of things, I think, we can do, because every time that a United States attorney has to brief a case, if he has not the books, he either does not brief it properly or does not decide it properly and that means not only a loss to the litigants but loss in time and energy of the courts and everybody connected with them. There is a very large reform that will have to be carried out if we are to do our duty by the courts and our duty by suitors in the courts and by the public at large.

"In other words, our position is—and I think it is a very well-considered one—that we will not do our duty by one of the important branches of the government if we do not provide courts and the United States attorneys with the tools with which to do their work and in the long run we lose money by it. We lose in energy and efficiency."

There has been some objection as an appropriation would enlarge rather than decrease the expenses of the department of justice and Mr. Stone said:—

"It is not possible for the department of justice to curtail its expenses as other departments have been able to do since the war. All the litigation and the legal complications and questions growing out of the war are reaching their peak just now. That is true not only of war transactions, but especially in the court of claims and also in the various other departments wherever legal questions have grown out of the war.

"Then, too, the expansion of federal legislation keeps us going up in expenditure and up in performance of legal service for the government I think that we are certainly reaching a point where the load is larger than it has ever been before. Whether it is as large as it is going to be depends of course upon how much legislation Congress passes and also whether or not we are going to stem the current of prohibition cases. This means that while other departments can cut down it is very difficult for the department of justice to cut down and do its work properly. I believe that the statistics show that in the last 12 to 14 years the actual work done in the department so far as it can be measured in statistics, has quadrupled, whereas our expenditure has not more than doubled and our personnel has not more than doubled."

SENATE 99—THE BILL RELATIVE TO PROFESSIONAL DISCIPLINE

At the recent session of the legislature Messrs. Thomas W. Proctor and Felix Rackemann introduced the bill, Senate 99, which is reprinted herewith. While the plan suggested was new, it attracted considerable support at the hearing before the Judiciary Committee and little, if any, opposition. The bill was considered by the Council of the Bar Association of the City of Boston and approved, subject to the following suggested changes:

Amendments Suggested

Sec. 1. Instead of having appointments made in each county, the state outside of Suffolk County should be divided into not more than three districts and appointments should be made in Suffolk and in each of the districts.

Sec. 2. There should be five bar masters and one should be designated by the Justices as chairman.

Sec. 3. The bar masters should all sit at hearings, so far as possible, three to constitute a quorum. The meetings should be convened by the chairman whenever necessary.

Sec. 4. It should be provided that cases may be brought before bar masters by duly authorized committees of Bar Associations, as well as by the bar counsel, and that such committees may assist the bar counsel in presenting such cases.

Sec. 8. There should be added at the end the following words: "with a transcript of the evidence taken before them, and with their recommendation as to the disposition which should be made of the case."

Sec. 9. For the first 5 lines of this section there should be substituted the following: "Any such report of findings shall be given the weight which is given by a court of equity to a master's report accompanied by a report of the evidence, and after a hearing the court shall enter its order or decree either (a)".

Sec. 10. The bar counsel in Suffolk should be paid a salary. In the other districts bills of bar counsel should be paid by the county in which the person complained of has his office. Bar masters should serve without compensation.

Sec. 11. Strike out the words "a criminal case" and substitute "courts."

It was also suggested by Mr. Frederick W. Mansfield, who appeared in support of the bill, that reinstatement cases should be brought within the functions of the bar counsel.

The legislature referred the bill to the next legislative session for further study, and it is here reprinted in order to provoke discussion and suggestions at the bar. F. W. G.

SENATE . . . . No. 99

To accompany the petition of Thomas W. Proctor and another that provision be made for more effective disciplinary work carried on through the voluntary efforts of bar associations. Joint Judiciary.

The Commonwealth of Massachusetts

In the Year One Thousand Nine Hundred and Twenty-Five.

An Act to provide an Official and hence more Effective Means of accomplishing the Disciplinary Work heretofore done through the Voluntary Efforts of Bar Associations.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

SECTION 1. The justices of the supreme judicial court shall from time to time appoint, in each county, a member of the bar residing or practicing in such county, who shall be known as the bar counsel for that county; and whose duty it shall be to hear and make preliminary investigation respecting any complaints made to them of any malfeasance, dereliction or failure on the part of any member of the bar within their respective counties to live up to the high standards of their profession. Any such appointment may be at pleasure recalled.

SECTION 2. The justices shall also, from time to time appoint three or more members of

the bar residing or practicing in each county, who shall be known as bar masters, and any such appointments may be at pleasure recalled.

SECTION 3. It shall be the duty of the bar counsel to convene from the bar masters in their respective counties sittings for inquiry into any case or cases of alleged professional misconduct or failure to live up to the high standards of the bar, which after their preliminary investigations they deem proper for more extended inquiry. Such boards of inquiry shall consist of at least three bar masters selected as they may be found available by the bar counsel, and he shall designate one of the board to be presiding officer.

SECTION 4. The bar masters so convened shall conduct careful inquiry into any and all cases brought to their attention by the bar counsel, and witnesses may be summoned to attend and testify, and to produce books and papers before them, and shall be sworn as provided for other hearings by section eight of chapter two hundred and thirty-three of the General Laws. Witnesses so summoned shall be entitled to fees and subject to the same penalties for default as therein provided.

SECTION 5. The bar counsel shall, at least seven days before the sitting, furnish the person complained of, notice of the time and place set for the sitting, and also a written statement

sufficient reasonably to acquaint him with the full nature of the charges and enable him to prepare himself for the inquiry; and the bar counsel shall present at the inquiry all material and competent facts and evidence, within his possession or knowledge, relating thereto. The masters may adjourn their hearings from time to time. The person complained of, if appearing, shall be fully heard, by counsel if desired, and the inquiry shall be conducted as nearly as practicable in the same manner as hearings by masters in equity.

SECTION 6. The bar masters may appoint an official stenographer to report any hearings before them, and may order transcripts of the record as judges of the superior court may do. The stenographer shall be sworn by the presiding officer.

SECTION 7. The bar counsel shall keep accurate records of all cases presented by them respectively to the bar masters showing the nature of the charge, the date or dates of hearing and the disposition of each case, and such shall be public records to be filed by each bar counsel at the end of each calendar year with the clerk of courts in his county, or the clerk of the supreme judicial court in Suffolk county.

SECTION 8. The bar masters shall either (*a*) dismiss the case, if, in their judgment, or the

judgement of a majority, no charge meriting censure has been substantiated; or (*b*) administer to the person charged such censure in writing as they, or a majority of them, may deem proper; or (*c*) report their findings of fact in full to the justices of the supreme judicial court.

SECTION 9. Any such report of findings shall be conclusive of the facts reported, and, upon the filing of the same, and after such hearing thereon, if any, as the court may order, the court shall enter its order or decree either (*a*) dismissing the case, or (*b*) censuring the person complained of as it may deem proper, or (*c*) suspending the person from the bar for a time stated, or (*d*) removing the person from the bar; and such orders or decrees shall remain in full force until modified or revoked by the same court.

SECTION 10. Bar counsel and masters serving in accordance herewith shall be entitled to compensation at the rate of four dollars per hour for each hour of actual service and to reimbursement for actual expenses of travel, the same to be paid by the treasurers of the respective counties on presentation of proper itemized statements approved by a judge of the superior court. Stenographers employed, officers serving subpoenas, and witnesses attending shall be paid by the county treasurers upon presenta-

tion of itemized statements certified to be correct by either the presiding officer or the bar counsel.

SECTION 11. Since the maintenance by the legal profession of the highest ethical standards is of grave importance to society, and all departures therefrom should be exposed and properly dealt with, all statements made by any informers or witnesses, as provided for by this chapter, shall be privileged to the same extent as statements made to a district attorney, grand jury, or as witnesses in a criminal case are privileged.

SECTION 12. The justices of the supreme judicial court may from time to time make and promulgate such rules as they may think proper for the administration of this act.

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